THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—THOMAS WEBB GREENE, Esq., Q.C.

EX-OFFICIO MEMBERS.

SIR RICHARD BAGGALLAY, Knt., M.P. .	ATTORNEY-GENERAL.
SIR JOHN HOLKER, Knt., M.P. . .	SOLICITOR-GENERAL.

ELECTED MEMBERS.

MR. SERJEANT SIMON, M.P. MR. SERJEANT PULLING	Serjeants' Inn.
W. B. GLASSE, ESQ., Q.C. JOHN PEARSON, Esq., Q.C.	Lincoln's Inn.
WILLIAM FORSYTH, Esq., M.P., Q.C. JAMES FITZJAMES STEPHEN, Esq., Q.C.	Inner Temple.
T. W. GREENE, Esq., Q.C. JOSEPH BROWN, Esq., Q.C.	Middle Temple.
JOHN A. RUSSELL, Esq., Q.C. WILLIAM CRACROFT FOOKS, Esq., Q.C.	Gray's Inn.
WILLIAM WILLIAMS, Esq. (Firm—Messrs. Currie and Williams), Lincoln's Inn Fields W. S. COOKSON, Esq. (Firm—Messrs. Cookson, Wainewright, & Pennington), 6, New Square, Lincoln's Inn	Incorporated Law Society.

Secretary—JAMES THOMAS HOPWOOD, Esq., 10, Old Square, Lincoln's Inn.

THE

LAW REPORTS.

CASES

DETERMINED BY THE

Court for Crown Cases Reserved.

REPORTED BY

ARTHUR WILSON, Barrister-at-Law.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

VOL. II.

FROM MICHAELMAS TERM, 1872, TO TRINITY TERM, 1875,

BOTH INCLUSIVE.

XXXVI—XXXVIII VICTORIA.

LONDON:

Printed for the Incorporated Council of Law Reporting for England and Wales,

BY WILLIAM CLOWES AND SONS,

DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.

PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.

1875.

TABLE OF CASES REPORTED

IN THIS VOLUME.

B.

	PAGE
Reg. *v.* Barratt	81

C.

Reg. *v.* Christian	94
—— *v.* Cooper	123
—— *v.* Creese	105
—— *v.* Cullum	28

F.

Reg. *v.* Farrell	116
—— *v.* Foulkes	150
—— *v.* Francis	128

G.

Reg. *v.* Goldsmith	74
—— *v.* Gumble	1

H.

Reg. *v.* Hazelton	134

J.

Reg. *v.* Johnson	15

K.

Reg. *v.* Kitchener	88

L.

	PAGE
Reg. *v.* Lock	10

M.

Reg. *v.* Middleton	38
—— *v.* Morton	22

N.

Reg. *v.* Negus	34

P.

Reg. *v.* Pembliton	119
—— *v.* Prince	154

S.

Reg. *v.* Satchwell	21

T.

Reg. *v.* Taylor	147
—— *v.* Thomas	141

W.

Reg. *v.* Weaver	85
—— *v.* Widdop	3

TABLE OF CASES CITED.

A.

		PAGE
Ash, In re. Ex parte Fisher	Law Rep. 7 Ch. 636	111, 115
Attorney-General *v.* Lockwood	9 M. & W. 378	155

B.

Brown *v.* Vawser	4 East, 584	24, 26
Buckmaster *v.* Reynolds	13 C. B. (N.S.) 62	166

C.

Chanter *v.* Hopkins	4 M. & W. at p. 404	45
——— *v.* Johnson	14 M. & W. 408	24, 26
Clough *v.* London and North Western Railway Company	Law Rep. 7 Ex. 26	44
Cohen, Ex parte	Law Rep. 7 Ch. 20	111

D.

Duignan, Ex parte	Law Rep. 6 Ch. 605	7

F.

Fisher, Ex parte. In re Ash	Law Rep. 7 Ch. 636	111, 115
Fowler *v.* Paget	7 T. R. 509	165
Fulwood's, Lady, Case	Cro. Car. 484	158

G.

General Furnishing Co., In re, *v.* Venn	2 H. & C. 153	112
Goddard's Case	2 Co. Rep. 5	26

H.

Hearne *v.* Garton	2 E. & E. 16	165
Hench's Case	2 Russell on Crimes, 4th ed. at p. 215	58
Heymann *v.* Reg.	Law Rep. 8 Q. B. 102	77, 79, 80

I.

		PAGE
Isaac, Ex parte	Law Rep. 6 Ch. 58.	7

L.

Lee *v.* Simpson	3 C. B. 871	155, 163
Lomax *v.* Buxton	Law Rep. 6 C. P. 107	111, 115

M.

Marshall *v.* Bishop of Exeter	Law Rep. 3 H. L. 17	26
Mercer *v.* Peterson	Law Rep. 2 Ex. 304; Law Rep. 3 Ex. 105	111
Morden *v.* Porter	7 C. B. (N.S.) 641	164

N.

Nash *v.* Reg.	4 B. & S. 935	77

R.

Ratcliffe's Case	3 Co. Rep. 37	158
Reg. *v.* Adams	1 Den. Cr. C. 38	48, 68
—— *v.* Bailey	12 Cox, Cr. C. 56	35
—— *v.* Baldry	2 Den. Cr. C. 430	6
—— *v.* Barnes	2 Den. Cr. C. 59	69
—— *v.* Barrow	Law Rep. 1 C. C. 156	83
—— *v.* Beaumont	Dears. Cr. C. 270	151
—— *v.* Bennett	4 F. & F. 1105	12
—— *v.* Blake	6 Q. B. 126	77
—— *v.* Booth	12 Cox, Cr. C. 231	155, 173
—— *v.* Bowers	Law Rep. 1 C. C. 41	35, 37, 152
—— *v.* Camplin	1 Den. Cr. C. 89	83
—— *v.* Case	1 Den. Cr. C. 580	12
—— *v.* Cohen	2 Den. Cr. C. 249	55
—— *v.* Cohen	8 Cox, Cr. C. 41	168
—— *v.* Cullum	Law Rep. 2 C. C. 28	152
—— *v.* Day	9 C. & P. 722	12
—— *v.* Ely	15 Q. B. 827	93
—— *v.* Findge	Leigh & Cave, Cr. C. 390	131
—— *v.* Fletcher	Law Rep. 1 C. C. 39; Bell Cr. C. 63	7, 12, 81, 83, 84
—— *v.* Forbes and Webb	10 Cox, Cr. C. 362	169
—— *v.* Garner	1 Den. Cr. C. 329	6
—— *v.* Garner	3 F. & F. 681	131
—— *v.* Gaylor	Dears. & B. Cr. C. 288	149
—— *v.* Geering	18 L. J. (M.C.) 215	131
—— *v.* Giles	Leigh and Cave, Cr. C. 502	138
—— *v.* Gillings	1 F. & F. 36	47
—— *v.* Golde	2 Mood. & Rob. 425	101
—— *v.* Goodbody	8 C. & P. 665	55, 69
—— *v.* Gray	Leigh & Cave, Cr. C. 365	77
—— *v.* Gray	4 F. & F. 1102	131
—— *v.* Green	3 F. & F. 274	167

		PAGE
Reg. *v.* Harris	Dears. Cr. C. 344	30, 31
—— *v.* Harvey	9 C. & P. 353	62
—— *v.* Hibbert	Law Rep. 1 C. C. 184	155, 167
—— *v.* Hicklin	Law Rep. 3 Q. B. 360	164
—— *v.* Hodgkiss	Law Rep. 1 C. C. 212	145
—— *v.* Holt	Bell, Cr. C. 280	130
—— *v.* Hopkins	Car. & M. 254	155
—— *v.* Howes	3 E. & E. 332	158, 178
—— *v.* Jarvis	Law Rep. 1 C. C. 96	6
—— *v.* Johnson	2 Den. Cr. C. 310	62
—— *v.* Jones	1 Den. Cr. C. 188	47
—— *v.* Kay	Dears. & B. Cr. C. 231	47, 58
—— *v.* Kipps	4 Cox, Cr. C. 167	155
—— *v.* Little	10 Cox, Cr. C. 559	47
—— *v.* Lock	Law Rep. 2 C. C. 10	83
—— *v.* Marsh	4 D. & R. 260	155
—— *v.* Martin	8 Ad. & E. 481	77
—— *v.* Millard	R. & R. 245	131
—— *v.* Mycock	12 Cox, Cr. C. 28	155, 172
—— *v.* Negus	Law Rep. 2 C. C. 34	151, 152
—— *v.* Nicholson	2 Leach, Cr. C. 610	63
—— *v.* Oddy	2 Den. Cr. C. 264	130
—— *v.* Olifier	10 Cox, Cr. C. 402	155, 169, 172, 173
—— *v.* Parker	7 C. & P. 829; 2 Moo. Cr. C. 1	138, 140
—— *v.* Prince	Law Rep. 1 C. C. 150	44, 48, 49, 50, 53, 57, 63, 64, 70
—— *v.* Reeve	Law Rep. 1 C. C. 362	6
—— *v.* Richardson	2 F. & F. 343	131
—— *v.* Robins	C. & K. 546	155, 169, 172, 173
—— *v.* Robinson	Law Rep. 1 C. C. 80	5, 9
—— *v.* Ryan	2 Hawk. P. C. C. 25, § 96	177
—— *v.* Scott	Dears. & B. Cr. C. 47	5, 8, 9
—— *v.* Shaw	Leigh & Cave, Cr. C. 579	7
—— *v.* Skeen	Bell, Cr. C. 97	5
—— *v.* Sleep	8 Cox, Cr. C. 472	168, 176
—— *v.* Smith	2 Russell on Crimes, 4th ed. at p. 191	55, 69
—— *v.* Stewart	1 Cox, Cr. C. 174	58
—— *v.* Stoggett	1 Dears. Cr. C. 656	7
—— *v.* Thorpe	Dears. & B. Cr. C. 562	31
—— *v.* Tinckler	1 F. & F. 513	168
—— *v.* Tite	Leigh & Cave, Cr. C. 29	35, 36
—— *v.* Turner	11 Cox, Cr. C. 551	35, 152
—— *v.* Turner	2 Moo. Cr. C. 41	177
—— *v.* Tyree	Law Rep. 1 C. C. 177	151, 152
—— *v.* Ward	Law Rep. 1 C. C. 356	120
—— *v.* Watkinson	26 L. T. (N.S.) 853	77
—— *v.* Williams	8 C. & P. 286	12
—— *v.* Wilson	2 Moo. Cr. C. 52	77
Rex *v.* Adams	2 Russell on Crimes, 4th ed. at p. 200	45, 63, 71
—— *v.* Aris	6 C. & P. 348	22
—— *v.* Atkinson	2 East, P. C. 673	45, 63, 69, 71
—— *v.* Burton	1 Moo. Cr. C. 237	152
—— *v.* Coleman	2 East, P. C. 672	55, 69, 71
—— *v.* Cooke	8 C. & P. 586	131
—— *v.* Davenport	2 Russell on Crimes, 4th ed. at p. 201	43, 45, 63

		PAGE
Rex *v.* Davis	1 Leach, Cr. C. 65, n.	77
—— *v.* Egerly	3 Salk. 183	92
—— *v.* Egginton	2 Leach, Cr. C. 913	61
—— *v.* Forbes	7 C. & P. 224	131
—— *v.* Fountleroy	2 Bing. 413	25
—— *v.* Gill	2 B. & Ald. 204	77
—— *v.* Glenhill	4 A. & E. 624	157
—— *v.* Hartley	Russ. & Ry. 139	30
—— *v.* Haughton	5 C. & P. 559	121
—— *v.* Jackson	1 Moo. Cr. C. 119	48, 64
—— *v.* Jackson	3 Camp. 370	138
—— *v.* Lockett	1 Lea. Cr. C. 94	138
—— *v.* Longstreeth	1 Moo. Cr. C. 137	47, 51, 58, 64
—— *v.* Lord Grey	9 St. Tr. 127	155
—— *v.* Lyon	Russ. & Ry. 255	26
—— *v.* Marsh	2 B. & C. 717	162
—— *v.* Mason	2 T. R. 581	76, 79
—— *v.* McDaniel	Fost. 121	61
—— *v.* Nettleton	1 Moo. Cr. C. 259	152
—— *v.* Nichol	R. & R. 130	12, 13
—— *v.* Parkes	2 Leach, Cr. C. 614	62
—— *v.* Pearce	2 East, P. C. at p. 603	47, 58
—— *v.* Rosinski	1 Moo. Cr. C. 19	12
—— *v.* Ryan	2 Moo. Cr. C. 15	77
—— *v.* Savage	5 C. & P. 143; 2 Russell on Crimes, 4th ed. at p. 201	43, 63
—— *v.* Small	8 C. & P. 46	58
—— *v.* Snowley	4 C. & P. 390	30, 31
—— *v.* Turner	1 Moo. Cr. C. 239	77
—— *v.* Walsh	R. & R. Cr. C. 215	101
—— *v.* Whiley	2 Lea. Cr. C. 983	131, 132
—— *v.* Wilkins	1 Leach, Cr. C. 520	58

S.

Sheppard's Case	9 C. & P. 121	58
Sill *v.* Reg.	1 E. & B. 553	77
Stennel *v.* Hogg	1 Notes to Saunders by Williams, at p. 261	79
Sydserff *v.* Reg.	11 Q. B. 245	77

T.

Taylor *v.* Newman	4 B. & S. 89	166
Todhunter, Ex parte	Law Rep. 10 Eq. 425	111
Turner *v.* Postmaster-General	5 B. & S. 756	7

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXVI VICTORIA.

THE QUEEN *v.* GUMBLE.

1872
Nov. 23

Larceny—Indictment—Amendment—Money—14 & 15 *Vict. c.* 100, *ss.* 1, 18.

The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign :—

Held, that by 14 & 15 Vict. c. 100, s. 1, the Court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence;" and that, by s. 18, the indictment so amended was proved.

CASE stated by the Chairman of the Surrey Quarter Sessions :—

At the general quarter session of the peace holden by continuance at St. Mary, Newington, in and for the county of Surrey, on the 3rd of July, 1872, James Gumble was indicted for stealing, on the 29th of May, 1872, nineteen shillings and sixpence from William Jackson Walton.

The prosecutor had been playing at throwing sticks at cocoa nuts on Epsom Downs, and had to pay the prisoner sixpence; but having nothing less than a sovereign, he said to the prisoner, "Have you change for a sovereign?" The prisoner said "Yes;" and in consequence of that prosecutor gave him a sovereign. He then pulled some money out of his pocket, and said "I haven't enough, I'll go and get it for you; I won't be a minute, just wait here." The prosecutor waited nearly an hour for the prisoner, and then went for a policeman, leaving a friend who had been with him all the time to wait for the prisoner. This he did for

1872

THE QUEEN v. GUMBLE.

quite another hour after the prosecutor went for the policeman. The prisoner's son removed the sticks and cocoa nuts at the expiration of the first hour. The prisoner did not return, and was not apprehended until the following Saturday, the 1st of June, on which occasion, when he saw the prosecutor's friend, he immediately ran away, and was only captured after a chase of some distance. On his apprehension 4*l.* 10*s.* was found upon him.

It was objected by the prisoner's counsel that there was no case against the prisoner; for if he were guilty of any offence, he was guilty of stealing a sovereign; and that the Court had no power to amend the indictment.

The Court allowed the case to go on, and put it to the jury, that if they believed that the prisoner, at the moment of obtaining the sovereign, intended by a trick feloniously to deprive the prosecutor of the possession of the sovereign, they were to find him guilty. They found him guilty, and then the questions were reserved for the decision of the Court for Crown Cases Reserved, as to whether the prisoner, being found guilty of stealing a sovereign, could rightly be convicted under an indictment charging him with stealing nineteen shillings and sixpence; and also, whether the Court would have had the power to amend the indictment at an earlier stage of the case?

No counsel appeared for the prisoner.

John Thompson, for the prosecution. If there be any variance between the indictment and the proof, the indictment might, by 14 & 15 Vict. c. 100, s. 1 (1), be amended by inserting the word

(1) By 14 & 15 Vict. c. 100, s. 1: "Whenever, on the trial of any indictment for any felony or misdemeanour, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof . . . . in the name or description of any matter or thing whatsoever therein named or described, ... it shall and may be lawful for the Court before which the trial shall be had . . . . to order such indictment to be amended. . . . ."

By s. 18, "in every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or of any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved. . . ."

"money" as the description of the thing stolen. That would make the indictment good within s. 18. And, upon the case as stated, this amendment must be taken to have been made at the trial before verdict.

KELLY, C.B. We are all of opinion that there was power to amend if any amendment be necessary; and that, on the case as stated, we must take that to have been done, if it be necessary.

MARTIN, B. I think there was power to amend. And that may be done by altering the description to "money" simply, which makes the conviction good.

BRETT, J. The defect, if there be one, is one of description, and may be amended by describing the things stolen as "money." And, on the case, we must take this amendment as made before verdict.

GROVE and QUAIN, JJ., concurred.

Conviction affirmed.

Attorneys for prosecution: *Rogers & Sons.*

THE QUEEN *v.* WIDDOP.

Nov. 28.

Bankruptcy—Examination of Bankrupt—Irregularity—Waiver—32 & 33 *Vict. c.* 71, *ss.* 18, 96, 97, 108, 125.

A debtor petitioned for liquidation by arrangement on the 8th of June. The first meeting of creditors was held, and a resolution appointing a trustee passed on the 28th of June. The registrar's certificate of the appointment was dated the 5th of July. By a summons, issued on the 29th of June, the debtor was summoned to appear on the 9th of July, and be examined under ss. 96 & 97 of the Bankruptcy Act, 1869. He appeared on the 9th of July, and took no objection to the summons. The examination was adjourned to the 12th of July, on which day he again appeared without objection, and was examined. The examination having been admitted in evidence against him on a subsequent indictment for an offence under s. 11 of the Debtor's Act, 1869:—

Held, that supposing the summons to have been improperly issued before the registrar's certificate of the appointment of the trustee had been given, the defect was only an irregularity, which the debtor had waived by appearing and submitting to be examined without objection; and that the examination was properly admitted in evidence.

CASE stated by CLEASBY, B.:—

The prisoner was indicted at the last assizes held at Leeds,

1872

THE QUEEN v. WIDDOP.

under the 14 & 15 subsections of the 11th section of the Debtors Act, 1869; for that he being a trader, within four months before the commencement of his liquidation, obtained property on credit under the false pretence of dealing in the ordinary way of his trade, and had not paid for the same, and that he, being a trader within the like period of four months, disposed of otherwise than in the ordinary way of his trade, property obtained on credit and not paid for.

At the trial an examination of the prisoner, taken before the Registrar of the Bankruptcy Court, was tendered in evidence for the prosecution, and objected to.

The following are the dates of the proceedings in liquidation:—

The petition was presented on the 8th of June, 1872. The first meeting of creditors was held, and appointment of trustee made on the 28th of June, 1872. The registrar's certificate of the appointment of the trustee was dated the 5th of July, 1872. The prisoner was summoned to be examined under the 96th section of the Bankruptcy Act, 1869. The summons was issued on the 29th of June, and the prisoner attended in pursuance of it, and was examined on the 9th of July, and again by adjournment on the 12th of July.

The examination then taken was the one tendered in evidence. The first objection was, that the summons being issued before the certificate of appointment of trustee, was not in compliance with the 96th section, and the examination taken under it obtained by an unlawful exercise of authority, and therefore inadmissible. The summons was in the Form 76 of the bankruptcy forms.

Another objection taken, was that the examination was taken by the registrar, and not by the judge, as directed by the 97th section, and that there was no proof that the judge had, under the 67th section, delegated to the registrar the power of taking the examination.

To this it was answered that the summons was issued by the Court, and that the place, viz., the Court House, and time of examination were named in it, and that as the examination took place at the time and place named before the registrar, as a part of the proceedings in liquidation, it must be presumed that he was acting lawfully in taking the examination.

Another objection was taken, that so far as regards certain questions and answers in the examination, the questions had a direct tendency to criminate the prisoner by proving the very charges upon which the indictment was framed.

Upon this objection the cases, *Reg.* v. *Scott* (1); *Reg.* v. *Skeen* (2); *Reg.* v. *Robinson* (3), were referred to on behalf of the prosecution.

A fourth objection was, that whatever the law may have been under former Acts of Parliament, yet, under the present Act, as, by s. 108, the deposition is made evidence upon the death of the bankrupt, it ought not to be admitted during his lifetime.

It was proved that each sheet of the examination was signed by the prisoner.

The learned judge admitted the whole of the examination. The prisoner was convicted.

If the whole examination was admissible, the conviction was to stand. If the whole or any part was not admissible, the conviction was to be quashed.

Nov. 16. *Waddy* (*Wilberforce* with him), for the prisoner. The examination was not admissible as having been taken under the Bankruptcy Act, for the provisions of the Act were not complied with, and therefore the case differs from *Reg.* v. *Scott* (1) and *Reg.* v. *Robinson.* (3) The due issue of a summons is a condition precedent of the right to examine the debtor under ss. 96 and 97 of the Bankruptcy Act. (4) By s. 96 the summons can, in case of bank-

(1) Dears. & B. Cr. C. 47; 25 L. J. (M.C.) 128.

(2) Bell Cr. C. 97; 28 L. J. (M.C.) 97.

(3) Law Rep. 1 C. C. 80.

(4) By 32 & 33 Vict. c. 71, s. 18, "the appointment of a trustee shall be reported to the Court; and the Court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be conclusive evidence of the appointment of the trustee, and such appointment shall date from the date of such certificate."

By s. 96, "the Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt . . . ."

By s. 97, "the Court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the bankrupt, his dealings or property."

By s. 108, "in case of the death of the bankrupt or his wife, or of a witness whose examination has been received by any Court under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the Court, or a copy thereof purporting

1872

THE QUEEN v. WIDDOP.

ruptcy, only be issued on the application of the trustee and after adjudication. And by s. 18 the appointment of a trustee dates from the certificate, not the vote. In the case of liquidation, by s. 125, the certificate has the same effect as in bankruptcy, and therefore the appointment dates from the certificate, and the appointment of the trustee is the equivalent of adjudication. In this case, therefore, when the summons issued there was no trustee to apply, and nothing equivalent to adjudication had occurred. Nor was the examination admissible at Common Law. It was compulsory, and it tended to criminate: *Reg.* v. *Garner* (1); *Reg.* v. *Baldry* (2); *Reg.* v. *Jarvis.* (3)

[BYLES, J., referred to *Reg.* v. *Reeve.* (4)]

J. W. Mellor (*Tennant* with him), for the prosecution. The summons was regularly issued, for the trustee had been appointed at the time, though the appointment was not registered till afterwards. Whatever may be the case in bankruptcy, s. 125

---

to be so sealed, shall be admitted as evidence of the matters therein deposed to."

By s. 125, "the following regulations shall be made with respect to the liquidation by arrangement of the affairs of a debtor . . . .

"(1) A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may by a special resolution . . . . declare that the affairs of the debtor are to be liquidated by arrangement . . . . and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee . . . .

"(4) The special resolution, together with . . . . the name of the trustee appointed . . . . shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section; but if satisfied that it was so passed, and that a trustee has been appointed . . . . he shall forthwith register the resolution . . . .

"(6) The certificate of the registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy.

"(7) . . . . The provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement . . . . And in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy."

(1) 1 Den. Cr. C. 329; 18 L. J. (M. C.) 1.

(2) 2 Den. C. C. 430; 21 L. J. (M. C.) 130.

(3) Law Rep. 1 C. C. 96.

(4) Law Rep. 1 C. C. 362.

shows that in liquidation the appointment is something that precedes the registration: *Ex parte Duignan.* (1)

[*Waddy* referred to *Ex parte Isaac.* (2)]

But, even if it be otherwise, it was a mere irregularity, which the prisoner waived by appearing and submitting to be examined without objection: *Reg.* v. *Fletcher* (3); *Turner* v. *Postmaster-General* (4); *Reg.* v. *Shaw.* (5) There is a dilemma. If there was jurisdiction the examination was good under the Act. If not, it was a voluntary statement: *Reg.* v. *Stoggett* (6).

Waddy replied.

Cur. adv. vult.

Nov. 23. KELLY, C.B. We are all of opinion that the conviction in this case must be affirmed. Two points have been pressed upon us in argument on the part of the prisoner; first, that the summons under which he attended the Court and was examined was irregular, as having been issued before the registration of the resolution of creditors by which the trustee was appointed, and was issued, therefore, by a trustee whose appointment had not at the time been registered. Upon this question it is unnecessary to express any opinion, for we are all of opinion that the irregularity, if there was any, was waived by the appearance of the prisoner. The objection is a technical one. The section upon which it is founded prescribes merely the mode by which the person to be examined is to be brought before the Court. And I think it would be equally contrary to legal principles and common sense, if we were to hold that the prisoner, after voluntarily attending and submitting to examination without objection, was at liberty to raise an objection to the validity of the summons afterwards.

MARTIN, B. I am of the same opinion. The facts of the case are these: The prisoner presented his petition for liquidation on the 8th of June. The first meeting of creditors was held, and a trustee was appointed by the votes of the creditors on the

(1) Law Rep. 6 Ch. 605.
(2) Law Rep. 6 Ch. 58.
(3) Law Rep. 1 C. C. 320.
(4) 5 B. & S. 756; 34 L. J. (M. C.) 10.
(5) Leigh & Cave Cr. C. 579; 34 L. J. (M.C.) 169.
(6) 1 Dears. Cr. C. 656; 25 L. J. (M.C.) 93.

1872

THE QUEEN v. WIDDOP.

28th of June. On the following day the trustee applied for and obtained a summons, under s. 96 of the *Bankruptcy Act*, 1869, for the examination of the insolvent. The summons required the prisoner's attendance on the 9th of July; and he had the whole interval down to that day to consider his course. On the 9th of July he appeared without protest or objection. The examination was adjourned to the 12th, when he again appeared without objection and was examined. The examination was read over to him, and he signed his name to each sheet of it. Yet it is said that this examination is not admissible against him upon the present indictment. The ground of that contention is that it is said he was compelled to criminate himself. It is, no doubt, true that no man is, by the general rule of our law, bound to criminate himself. But the questions put to the insolvent were not for the purpose of criminating him; they were put for another purpose. The case of *Reg v. Scott* (1) expressly decided that an examination of a bankrupt, taken under circumstances similar to the present, if lawfully taken, is admissible afterwards in evidence against him. And I think that case is conclusive of the present. The examination in this case appears to me to have been lawful both at Common Law and under the statute. The Court of Chancery has always exercised the power of compulsory examination, and the Common Law Courts now do the same by interrogatories. It has been the opinion of many Judges (and I do not know that the opinion has ever been overruled) that an interrogatory may be put, although it tend to criminate, leaving the person interrogated to object to answering it. But here the examination was not in fact compulsory. The insolvent appeared and was examined, without making any objection, and, therefore, without being compelled. But the examination was also lawful under the statute. The objection taken under the statute is, that the summons was issued before the registration of the appointment of the trustee. But I think that objection fails; for, even if there was any irregularity, the prisoner, by appearing without objection, waived the irregularity, and submitted to the jurisdiction of the Court. For my own part, I am further of opinion that there was no irregularity.

(1) 1 Dears. & B. Cr. C. 47; 25 L. J. (M.C.) 128.

1872

THE QUEEN v. WIDDOP.

BRETT, J. I am of the same opinion. It has been contended that the answers of the prisoner were inadmissible because they were given under compulsion, and that compulsion was illegal. The alleged illegality consisted in this, that the summons was irregular, having been issued before the registration of the trustee's appointment. I think it is unnecessary here to decide from what point of time the trustee's appointment is to be taken as dating; or whether the summons was regular. The examination took place at a time when the trustee's title had been completed by registration, and when the Court had jurisdiction to examine the prisoner. It is a mistake to speak of it as a condition precedent to the jurisdiction that the debtor should have been regularly summoned. The defect was at most an irregularity, which was waived by the prisoner's appearing and submitting to be examined. It was admitted during the argument that the prisoner might have been tried for perjury committed on such an examination; and that is in principle an admission of jurisdiction. The present case seems to me to be governed by *Reg.* v. *Scott* (1), and *Reg.* v. *Robinson.* (2)

BYLES and MELLOR, JJ., concurred.

Conviction affirmed.

Attorney for prisoner: *M. K. Braund, for J. Green, Bradford.*

Attorneys for prosecution: *Clarke & Son, for Terry & Co., Bradford.*

(1) 1 Dears. & B. Cr. C. 47; 25 L. J. (M.C.) 128. (2) Law Rep. 1 C. C. 80.

1872
Nov. 23.

THE QUEEN *v.* LOCK.

Assault—Consent—Submission.

The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. It was proved that the prisoner took the boys into a field, and did acts towards them which amounted to indecent assaults unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence, the Judge left to the jury the question whether the boys merely submitted to the acts, ignorant of what was going to be done to them or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did; and told the jury that in the former case they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty, on the ground that the boys merely submitted to his act not knowing its nature:—

Held, that the direction of the Judge was right, and the conviction must be upheld.

Case stated by the Deputy Assistant Judge of the Middlesex Quarter Sessions:—

At the general session of the peace for the county of Middlesex on the 4th day of June, 1872, James Lock was tried upon an indictment which charged him with indecently assaulting Frederick William Sandell and George Goodge.

It was proved by three witnesses that they saw the defendant in a field by the Edgware Road take each of the boys in succession upon his legs, play with their private parts, unbutton his trowsers and theirs, lie upon them, and move himself as if in the act of having connection with a woman.

The two boys, each of whom was only eight years old, proved that the defendant met them in the Edgware Road, said he would take them to some fireworks, gave them biscuits and some beer, took them into the field, went up to a wall, to which they followed him, there sat upon the grass, placed them successively upon his lap, laid his hand on their private parts, unbuttoned their trowsers and his own, threw them down on their backs and lay upon them, moving himself in an indecent manner, which one of the boys described by a gesture; the defendant was interrupted by the coming up of the three witnesses, when he told the boys not to tell. The boys were not asked by the counsel on either

side if it was done against their will, or with their consent, but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap, and laid them on the ground.

On these facts, it was contended by the counsel for the defendant, that there was no case for the jury, inasmuch as the filthy acts were not done against the will of the boys.

Having determined that it was a question for the jury, in summing up the learned judge stated to them that the law recognised a distinction between mere submission and positive consent. A person may submit to an act done to him from ignorance, or his consent may be obtained by fraud, and in neither case would it be such a consent as the law contemplates. Consent means an active will in the mind of the patient to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act. It had been contended that inasmuch as an assault must be an act done against the will of the patient, and the boys did not expressly dissent, there was no assault. But this assumes a consenting will on their parts, and both stated that they did not know what the defendant intended to do, nor the meaning of what he was doing. The facts of the case were undisputed, and the question left to the jury was, whether, in their judgment, the boys merely submitted to the filthy act ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did. In the former case they would find the defendant "guilty." In the latter case they would acquit him.

The jury found the defendant "guilty," stating that they did so, being of opinion that the boys merely submitted to the act of the defendant, not knowing the nature of such act.

The question being of frequent occurrence, and the law appearing to be unsettled, on the application of counsel for the defendant, the learned judge reserved, for the opinion of this Court, the question whether the definition of an assault "that it must be an act done against the will of the patient" extends to the case of submission to the act through ignorance of its nature, and when there was no positive exercise of the will in the way of dissent, or if the active

1872

THE QUEEN v. LOCK.

exercise of an actual dissenting will is necessary to be proved in order to constitute an assault. If it should be the opinion of this honourable Court that the direction of the jury was wrong, the conviction was to be quashed; if right it was to be confirmed.

No counsel appeared for the prisoner.

Metcalfe, for the prosecution. The direction of the learned judge was correct. There is a clear distinction between mere submission and consent: *Reg.* v. *Williams* (1); *Reg.* v. *Day* (2); *Reg.* v. *Case* (3); *Rex* v. *Rosinski.* (4) It may be otherwise, no doubt, upon a charge of rape; but the cases cited shew the distinction between rape and assault.

[BRETT, J. In cases of criminal assault by a father upon his daughter I have more than once, with the concurrence of Willes, J., told the jury that in the case of a young child and an adult they must consider whether there has been mere submission on the part of the child, known to be merely so by the adult, or whether there has really been consent.]

Rex v. *Nichol* (5); *Reg.* v. *Bennett* (6); *Reg.* v. *Fletcher* (7); *Reg.* v. *Fletcher* (8) were also cited.

KELLY, C.B. Had this been a case of rape, I might probably have had no hesitation in saying that a rape had not been committed. But here the charge is not one of rape; it is a charge of assault. And the question is, whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault. I think it does. It is much like an act done to a person while asleep. And though I do not say that connection with a woman in such a case would be rape, it would be an assault. In the present case the act done was indecent and immoral, and it involved actual physical contact; it may, therefore, be an assault. And though there was submission

(1) 8 C. & P. 286.
(2) 9 C. & P. 722.
(3) 1 Den. Cr. C. 580.
(4) 1 Moo. Cr. C. 19.
(5) R. & R. 130.
(6) 4 F. & F. 1105.
(7) Bell Cr. C. 63; 28 L. J. (M.C.) 85.
(8) Law Rep. 1 C. C. 39.

1872

THE QUEEN v. LOCK.

on the part of the children, I do not think there was any consent; for they were so wholly ignorant of the nature of the act done as to be incapable of exercising their will one way or the other.

MARTIN, B. Such an act as that of the prisoner is primâ facie an assault. And I see no evidence of consent. The case cited of the female scholar, *Rex* v. *Nichol* (1), is very like this.

BRETT, J. I agree that to constitute an assault an act must be against the consent of the person to whom it is done. But the question is, whether the judge gave a proper definition to the jury of what is against consent. The case was of acts done to children of tender years by a man of mature years. Still if they had in fact consented to what was done their ignorance of its immorality would not make it an assault. Now, some parts of what the judge said may be open to criticism; but his real view is explained in the question he left to the jury: "The question left to the jury was, whether in their judgment the boys merely submitted to the filthy act ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did." That is, in substance, a direction that if the boys merely submitted to what was done (and if they merely did this, the prisoner must have known that it was so), it was an assault; but if there was consent it was no assault. Now, if a child does merely submit to what is done to it by an adult, and the adult knows this, that is an assault. The direction of the learned judge and the finding of the jury were therefore both right.

GROVE, J. I am of the same opinion. The question we are asked is, "whether the definition of an assault, that it must be an act done against the will of the patient, extends to the case of submission to the act through ignorance of its nature, and when there was no positive exercise of the will in the way of dissent, or if the active exercise of an actual dissenting will is necessary to be proved in order to constitute an assault." I do not think an actual dissenting will is necessary. The question is between the positive and the negative; and I think the mere negation of assent is sufficient.

(1) R. & R. 130.

1872

THE QUEEN v. LOCK.

QUAIN, J. Mere submission by one who does not know the nature of the act done cannot be consent. In many cases, as where an act is done to a person who is asleep, or who has been drugged, there is no consent, though there is no active dissent. And, on the finding of the jury, I think the case is the same here.

Conviction affirmed.

Attorneys for prosecution: *Allen & Son.*

END OF MICHAELMAS TERM, 1872.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXVI VICTORIA.

THE QUEEN *v.* JOHNSON.

1873
Jan. 25.

Perjury—Coroner—Deputy—Absence of Coroner—Lawful or Reasonable Cause—6 & 7 Vict. c 83, ss. 1, 2.

By 6 & 7 Vict. c. 83, s. 1, coroners are empowered to appoint deputies, provided that no deputy shall act "except during the illness of the coroner or his absence from any lawful or reasonable cause." By s. 2, "No inquisition shall be quashed by reason of such inquisition having been taken before any deputy instead of the coroner himself." The prisoner being indicted for perjury committed upon an inquest held before a deputy coroner, and the objection having been taken that there was no lawful or reasonable cause for the absence of the coroner:—

Held, first, that the question of lawful or reasonable cause was one for the judge, not for the jury.

Held, secondly (by Kelly, C.B., Pigott, B., Denman, J., and Pollock, B., Mellor, J., doubting), that, whatever the cause of absence, by s. 2 a valid inquisition might have been founded upon the inquest, and therefore the deputy had jurisdiction and perjury was committed.

CASE stated by Denman, J.

At the last winter assizes for the county of Durham, John Johnson was tried and found guilty of perjury, subject to the opinion of this Court upon the following case:

The perjury alleged was committed by false oaths taken before Thomas Dean, who held an inquest as deputy coroner touching the death of one Owen O'Hanlon.

Thomas Dean was called, and produced an appointment, dated 1866, of himself as deputy coroner for Darlington Ward. This

1873

THE QUEEN v. JOHNSON.

appointment was duly signed and sealed by William Dale Trotter, the then and present coroner for the said ward, and properly countersigned, as required by law.

The inquest was opened on the 11th of October, 1872, and continued by adjournment, from time to time, on several days up to and after the 7th of November, the day of the perjury in question.

The said Thomas Dean, upon cross-examination, and the said coroner, who was also examined, proved that, since 1866, by far the largest number of all the inquests held in Darlington Ward had been held by the said Thomas Dean as deputy-coroner. That on the 11th of October, when the inquest in question was commenced, the said coroner, who was also an attorney in practice, and registrar of the county court, and held some other offices, was absent from his home and usual place of business as an attorney, having left home on the 24th of September previous, in order to take a vacation until the 14th of October, such absence and vacation, and air, and exercise having been recommended to him by medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone some eighteen months previously; that between the last-mentioned dates he spent three or four days in every week shooting; that owing to his engagements as registrar of the county court, the above period was the only time of the year during which he could obtain any vacation, that being the period appointed for the vacation of the registrars of county courts. Mr. Trotter also stated that when the inquest in question began, he was not in such a state of health as to be able properly to discharge the duty of holding an inquest of the kind and duration of which that in question appeared likely to be.

Upon these facts it was contended, on behalf of the prisoner that the proceeding before the said Thomas Dean was coram non judice, because it was incumbent on the prosecution, in order to shew jurisdiction in a deputy coroner to administer an oath, to prove affirmatively that there was lawful and reasonable cause for the absence of the coroner (6 & 7 Vict. c. 83, s. 1, proviso 2 (1)), and

(1) By 6 & 7 Vict. c. 83, s. 1:— "It shall be lawful for every coroner of any county, city, riding, liberty, or division, and he is hereby directed, by writing under his hand and seal, to nominate and appoint from time to

that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury, and not for the judge.

The counsel for the Crown contended that even if the facts proved were insufficient to shew that there was lawful or reasonable cause, still, inasmuch as by section 2 of the same Act, it is provided that inquisitions are not to be quashed by reason of their having been taken by a deputy, the oath on which perjury was assigned, being an oath on which a good inquisition might have been founded, could not be said to be coram non judice, but was one legally administered in a judicial proceeding, and therefore one on which perjury could be legally assigned.

The learned judge held that, even assuming it to be for the prosecution to make out affirmatively, in such a case, that there was lawful or reasonable cause for the absence of the coroner (which point, however, he reserved for this Court), there was in this case such lawful or reasonable cause; but he reserved for this Court the question whether there was evidence upon which he could properly so hold.

The first question of law reserved for the opinion of this Court was, whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If it was not the conviction was to stand.

The second question reserved was, whether it was for the judge or for the jury to decide whether there was such a reasonable

---

time a fit and proper person, such appointment being subject to the approval of the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, to act for him as his deputy, in the holding of inquests; and all inquests taken and other acts performed by any such deputy coroner, under and by virtue of any such appointment, shall be deemed and taken, to all intents and purposes whatsoever, to be the acts and deeds of the coroner by whom such appointment was made;... Provided, also, that no such deputy shall act for any such coroner as aforesaid, except during the illness of the said coroner, or during his absence from any lawful and reasonable cause. . . ."

By s. 2, "No inquisition found upon or by any coroner's inquest, nor any judgment recorded upon or by virtue of any such inquisition, shall be quashed, stayed, or reversed, . . . by reason of any such inquisition having been taken before any deputy instead of the coroner himself. . . ."

1873

THE QUEEN v. JOHNSON.

cause. If for the jury, the conviction was to be quashed, unless the first question were decided in the negative. If for the judge, then

The third question reserved was, whether there was evidence upon which the learned judge might properly decide as he did. If so, the conviction was to stand. If not, to be quashed, unless the first question were decided in the negative.

Campbell Foster, for the prisoner. Lawful or reasonable cause of absence in the coroner is a condition precedent of the deputy's jurisdiction, and must therefore be proved. And the question is one for the jury, like questions of reasonable time, and the like: Taylor on Evidence, s. 30, p. 46, 6th ed. And though by s. 2 of the Act it is said that the inquisition cannot be quashed for such a defect as this, it does not follow that the jurisdiction of the deputy may not be inquired into in any other way and for any other purpose.

H. Giffard, Q.C. (*Luck* with him), was not called upon.

KELLY, C.B. We are all of opinion that the conviction should be affirmed. The first question is, whether it was for the judge or for the jury to determine the question of the existence of lawful or reasonable cause for the coroner's absence. I am clearly of opinion that the question was not one for the jury, but for the judge.

But if there were any doubt upon this point, the 2nd section is conclusive. Whether the inquisition was valid or not is the very question we have to determine. If the Court of Queen's Bench were asked to quash the inquisition as invalid, the question it would have to decide would be exactly the same which is now before us. If the inquisition was valid there was jurisdiction, and perjury was committed. Then s. 2, after reciting in its preamble that "it is expedient to make provisions for supporting coroners' inquisitions, and for preventing the same from being quashed on account of technical defects," enacts that "no inquisition shall be quashed," amongst other things, "by reason of any such inquisition having been taken before any deputy, instead of the coroner himself." That is the very objection which is taken here. And as it is

expressly declared that such an objection shall not be ground for quashing the inquisition, the inquisition is valid, the deputy had jurisdiction, and the conviction for perjury is good.

MELLOR, J. I am of the same opinion. Primâ facie the deputy coroner must be taken to have been acting as such lawfully. But the deputy was called, and on cross-examination it was got out of him, it is said, that there was not a lawful or reasonable cause for the coroner's absence. But this was a matter arising incidentally in the course of a trial, like the question of sufficiency of search for a document the loss of which is alleged for the purpose of making secondary evidence of its contents admissible. And, like that, it is a question for the judge.

Upon the second point, although the inquisition may be amended, if required to be proved, I am not satisfied that it would cure the want of original jurisdiction to administer the oath, if such want existed. I therefore prefer to rest my judgment upon the first point, namely, that the question was for the judge, and that there was evidence of a sufficient ground of absence on the part of the coroner, so that the judge rightly decided as he did.

PIGOTT, B. I am of the same opinion. I prefer to rest my judgment upon the second ground stated by the Lord Chief Baron, though I do not differ as to the other.

DENMAN, J. I do not think it is necessary to decide that the deputy, acting as such, must be presumed to be in all respects rightly acting, though it may well be so. But I assume for the purposes of the case that the prisoner was entitled to an acquittal if there was any defect such as that here alleged. Then the prosecution took upon themselves the burden of proving the deputy's appointment. And the deputy was called, and upon cross-examination stated the facts, which it is contended show an absence of reasonable and probable cause. The objection was then taken that no evidence of the oath taken by the prisoner, could be received, because there was no lawful or reasonable cause for the coroner's absence, and therefore no jurisdiction in the deputy. And it was said that the question was one for the jury. I think very clearly

1873

THE QUEEN v. JOHNSON.

that, in all such cases, the question of lawful or reasonable cause is one for the judge, not for the jury. And I think I held rightly on the facts. But further, s. 2 gives the go-by to the question altogether. It clearly has to do with some case of acting on the part of a deputy, which might otherwise be a ground of objection to the inquisition, and it says that it shall not be quashed on such a ground. Therefore a good inquisition might have been founded upon these proceedings. And it follows that they were judicial proceedings, in the course of which perjury might be committed.

POLLOCK, B. I concur in both the reasons stated by the Lord Chief Baron.

Conviction affirmed.

Attorneys for the prosecution: *Langham & Son, for Steavenson & Meek, Darlington.*

Attorney for prisoner: *W. Brignall.*

END OF HILARY TERM, 1873.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXVI VICTORIA.

THE QUEEN *v.* CHARLES SATCHWELL.

1873
April 26

*Malicious Injury to Property—Arson—*24 & 25 *Vict. c.* 97, *s.* 17—*Stack of Straw.*

The prisoner was indicted, under 24 and 25 Vict. c. 97, s. 17, for setting fire to a stack of straw. It was proved that he set fire to a quantity of straw on a lory:—

Held, that he could not properly be convicted.

CASE stated by Blackburn, J.:—

At the last Summer Assizes for Warwick the prisoner was tried for wilfully and maliciously setting fire to a stack of straw, the goods of William Allsop.

It was proved that the prisoner did wilfully and maliciously set fire to a quantity of straw, amounting to 22 cwt., which was packed on a lory. The straw had been placed on the lory to convey it to market, and brought six or seven miles on the way. The horses had been removed, and the lory with the straw on it left for the night in the yard of an inn, ready to be taken on to market next morning.

The learned judge inclined to think that the straw, being packed on a lory, was not a stack within the meaning of the 24 & 25

1873

THE QUEEN v. SATCHWELL.

Vict. c. 97, s. 17 (1), and consequently that the setting fire to it was not a felony; but the case being clear in fact, directed a verdict of guilty, and sentenced the prisoner to seven years' penal servitude, reserving the point whether the setting fire to the straw was a felony.

No counsel appeared.

BOVILL, C.J. I think the conviction must be quashed. The indictment is for setting fire to a stack of straw. And it is shewn that the prisoner set fire to a quantity of straw on a lory. It does not appear whether it was being removed to or from a stack; but it was on its way to market. I do not think that is a stack. A somewhat similar point arose and was decided in the same way in *Rex* v. *Aris.* (2)

BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONYMAN, JJ., concurred.

Conviction quashed.

April 26.

THE QUEEN *v.* ARTHUR HENRY MORTON.

*Forgery—Deed—*24 *&* 25 *Vict. c.* 98, *s.* 20—*Letter of Orders.*

By 24 & 25 Vict. c. 98, s. 20, it is felony to forge "any deed, or any bond or writing obligatory:"—

Held, that a letter of orders under the seal of a bishop is not a deed within that section.

CASE stated by Bramwell, B.

At the last sessions of oyer and terminer, and gaol delivery at Worcester, the prisoner was tried and found guilty on an indictment, of which a copy is annexed.

The document which he had forged, when produced, was as follows:

(1) By 24 & 25 Vict. c. 97, s. 17, "Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble . . . shall be guilty of felony. . .'

(2) 6 C. & P. 348.

At the request of the Lord Bishop of *Melbourne*.

"By the tenor of these presents, we, Auckland, by Divine permission, bishop of Bath and Wells, do make it known unto all men that on Sunday, the 23rd day of December, in the year of our Lord one thousand eight hundred and sixty-*three*, we, the bishop before mentioned, solemnly administering holy orders under the protection of the Almighty in our cathedral church of Saint Andrew in Wells, did admit our beloved in Christ *Arthur Henry Morton a Master of Arts* (of whose virtuous and pious life and conversation and competent learning and knowledge in the Holy Scriptures we were well assured) into the holy order of deacons, according to the manner and form prescribed and used by the church of England, and him, the said *Arthur Henry Morton*, did then and there rightly and canonically ordain deacon; he having first in our presence freely and voluntarily subscribed to the thirty-nine articles of religion and to the three articles contained in the thirty-sixth canon, and he likewise having taken the oaths appointed by law to be taken for and instead of the oath of supremacy. In testimony whereof we have caused our episcopal seal to be hereunto affixed the day and year above written, and in the seventh year of our translation.

Auckland. 

Bath and Wells."

The signature and seal were the genuine signature and episcopal seal of Lord Auckland, Bishop of Bath and Wells, and the document was duly signed, sealed, and given out by him.

But when so given out the name in it of the person ordained was Joseph Leycester Lyne, the year was one thousand eight hundred and sixty, and not one thousand eight hundred and sixty-three, and in the margin the letters dismissory were stated to be from the Bishop of Exeter, not Melbourne.

The forgery consisted in altering the name, adding "a Master of Arts," altering the year, and changing Exeter to Melbourne. The alterations are in italics. It was proved that Lyne was

1873

THE QUEEN v. MORTON.

ordained by imposition of hands according to the service in the prayer book, and that this document had been delivered to him, and afterwards stolen or taken from him without his consent. It was also proved that no other deed or document ordaining or certifying the ordination is ever made or given, though the fact of ordination is recorded in a book kept for that purpose. Doubting whether the document was a deed within the meaning of the statute, the learned judge asked the opinion of the Court for the consideration of Crown Cases Reserved thereon.

Indictment. First count, that the prisoner feloniously did forge a certain deed purporting to be under the hand and seal of Lord Auckland, Bishop of Bath and Wells, which said forged deed was and is as follows,—[It was then set out verbatim],—with intent thereby to defraud, &c.

Second count, that the prisoner feloniously did forge a certain other deed purporting to be letters of orders under the hand and seal of Lord Auckland, Bishop of Bath and Wells, with intent thereby then to defraud, &c.

Third count, similar to the first, but charging the prisoner with uttering.

Fourth count, similar to the second, but charging the prisoner with uttering.

Goodman, for the prisoner. A letter of orders is not a deed. Many documents under seal are not deeds. Thus an award under seal is not: *Brown* v. *Vawser* (1); so of a licence: *Chanter* v. *Johnson*. (2) A deed has been often defined by the older writers. Thus in Co. Lit. 35, b, its requisites are stated to be, "Firstly, writing; secondly, in parchment or paper; thirdly, by a person able to contract; fourthly, by a sufficient name; fifthly, a person able to be contracted with; sixthly, by a sufficient name; seventhly, a thing to be contracted for; eighthly, apt words required by law; ninthly, sealing; and tenthly, delivery." And again, Co. Lit. 161, b, it is said, "A deed signifieth in the common law three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party." In Shepherd's Touchstone, chap. 4, p. 50, a deed is described as "sealed and delivered to prove and testify the agreement of the parties, whose

(1) 4 East, 584. (2) 14 M. & W. 408.

deed it is, to the things contained in the deed." These definitions limit the use of the word "deed" to that which contains a contract. But even if this be to limit the meaning of the word too much, it must at least be something having some actual operation, as passing an interest or creating a right. In Spelman's Glossary, title Factum, a deed is defined as "Scriptum solemne quo firmatur donum, concessio, pactum, contractus, et hujusmodi." And the definitions in Comyn's Digest, Cruise Digest, Tomlin's Law Dictionary, Wharton's Law Lexicon, and 1 Stephen's Commentaries, 5th ed. p. 487, are similar. Nothing has been held to be a deed which does not pass an interest or confer some right or authority: *Rex* v. *Fauntleroy* (1); 1 Arnould on Insurance, p. 143, n.

[BLACKBURN, J. If this letter of orders be the solemn and essential record of something of the same nature with a gift, &c., it would appear to be within Spelman's definition.

ARCHIBALD, J. It would then be very like a charter of feoffment.

BLACKBURN, J. The 4 Hen. 7, c. 13, deprived a clerk of his benefit of clergy for a second offence, if he "hath not then and there ready his letters of his orders, or a certificate of his ordinary witnessing the same."

BOVILL, C.J. That seems to shew that the letter of orders was not essential, but that a certificate would do as well].

The letter of orders is nothing more than a formal certificate. [He referred to Blunt's Book of Church Law, p. 201.]

Jelf (*Amphlett* with him), in support of the conviction. The word "deed" is used in this section in its most general sense. It stands first, and must not be limited by the words that follow it. And as to the general meaning of the word "deed," the definitions cited from Coke are too narrow. Many things are called and treated as deeds which contain no contract: Shepherd's Touchstone, p. 50, 8th ed. where "attornments, exchanges, surrenders, partitions, authorities, commissions, licences, revocations, and the like" are spoken of.

[BLACKBURN, J. Each of those is the solemn confirmation of an act passing an interest within Spelman's definition.]

(1) 2 Bing. 413.

1873

THE QUEEN v. MORTON.

The letter of orders is quite as much a deed as many of these. It is the formal evidence of the deacon's ordination, which is an act conferring authority and privileges. The letter of orders must, by the 137th canon of 1603, be produced at the first visitation. And by the 39th canon a deacon could not without it obtain employment in another diocese, 3 Burn's Eccl. Law, 9th ed. p. 61.

[BOVILL, C.J. Surely all that is merely directory to secure a bishop's knowing his clergy, and to prevent imposition.

BLACKBURN, J., referred to *Marshall* v. *Bishop of Exeter*. (1)]

Brown v. *Vawser* (2) and *Chanter* v. *Johnson* (3) are not in point. They were decided not on the nature of the instrument, but on the ground that there had been no delivery.

[Burrell's Law Dictionary, tit. Deed, 4; Bythewood and Jarman, p. 113; *Goddard's Case* (4); *Rex* v. *Lyon* (5); Co. Lit. 52 (a); 33 & 34 Vict. c. 91, were also cited.]

BOVILL, C.J. The prisoner is indicted for forging a document which is described as a deed, so as to bring his offence within s. 20 of 24 & 25 Vict. c. 98. That section speaks of forging "any deed, or any bond or writing obligatory;" and the question we have to consider is, whether the document in question is a deed within the meaning of the words there used. In form it is what is commonly known as a letter of orders under the episcopal seal; and it is necessary, therefore, to ascertain precisely the nature and character of such an instrument. Now the mode of ordaining a deacon in the Church of England is prescribed by the Book of Common Prayer. It must be in the face of the church; and upon the completion of the ceremony the ordained person becomes a deacon. No deed or grant is necessary. But from very early times it has been the practice, after the ordination is completed, to issue letters of orders under the bishop's seal. And at one time, as appears from the statute to which reference has been made, the production of his letter of orders, or a certificate from the ordinary, was necessary to entitle a clerk to the benefit of clergy. The letter of orders is a formal declaration under seal that the bishop

(1) Law Rep. 3 H. L. 17.
(2) 4 East, 584.
(3) 14 M. & W. 408.
(4) 2 Co. Rep. 5.
(5) Russ. & Ry. 255.

"did admit" the person to whom it is given "into the holy order of deacons, according to the manner and form prescribed and used by the Church of England, and him then and there did rightly and canonically ordain deacon . . . In testimony whereof" the seal is affixed. Is this, then, a deed within the meaning of the Act of Parliament? In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed. Now is the present instrument a deed in this sense? I by no means say that I have enumerated all the possible kinds of deeds; there may be others. But is this a document of the same kind? It does not purport to convey property, title, interest, or authority, but only to certify that a ceremony has taken place. It is a mere certificate or declaration of ordination. Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the Court of Probate. It is a certificate of the will having been proved and administration granted; but I never heard it suggested that that is a deed. I think, then, that a letter of orders is not a deed, and that the conviction cannot be supported.

BRAMWELL, B. I am of the same opinion.

BLACKBURN, J. I quite agree that the affixing a seal does not make a deed. The definition of a deed cited from Spelman seems to me the best; and I doubt whether the present instrument is within it, though I am not quite sure. But whatever be the meaning of the word "deed" in the abstract, the words of the section under which this indictment is framed are, "any deed,

1873

THE QUEEN v. MORTON.

bond, or writing obligatory;" and I think those words must be limited to something passing, or which is in affirmance of that which passes, a pecuniary interest; and, therefore, a deed such as this, if it be a deed, is not within them. It is not necessary to consider the question, whether the probate of a will would be a deed within this section. I rather think it is.

ARCHIBALD and HONYMAN, JJ., concurred.

Conviction quashed.

Attorneys for prosecution: *White & Son, for Curtler, Worcester.*
Attorneys for prisoner: *Rooke & Son.*

May 3.

THE QUEEN *v.* CULLUM.

Embezzlement—24 & 25 *Vict. c.* 96, *s.* 68—*Wrongful use of. Barge by Servant of Owner—Freight received neither "for," nor "in the Name," nor "on account of" Master.*

The prisoner was captain of a barge, and in the exclusive service of its owner. He was remunerated with half the earnings of the vessel, and had no authority to take any other cargoes but those appointed for him. It was his duty to account to his master for the proceeds of each voyage. On one occasion, although ordered to bring the barge back empty from a certain place, and forbidden to take a particular cargo, he, nevertheless, loaded such cargo in the barge, returned therewith, and received the freight. He did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it. The prisoner declared that the barge came back empty, and never accounted for the freight:—

Held, that he was not guilty of embezzlement, as the money was not received or taken into possession by him "for, or in the name of, or on the account of his master or employer," within 24 & 25 Vict. c. 96, s. 68.

CASE stated by the Chairman of the West Kent Sessions.

The prisoner was indicted, as servant to George Smeed, for stealing 2*l.*, the property of his master.

The prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London, and to receive back such return cargo, and from such persons, as his master should direct. The prisoner had no authority

to select a return cargo, or take any other cargoes but those appointed for him. The prisoner was entitled, by way of remuneration for his services, to half the earnings of the barge, after deducting half his sailing expenses. Mr. Smeed paid the other half of such expenses. The prisoner's whole time was in Mr. Smeed's service. It was the duty of the prisoner to account to Mr. Smeed's manager on his return home after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure to Mr. Pye, of Caxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston. Going from London to Murston, he would pass Caxton. Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye, at Caxton, and received from Mr. Pye's men 4*l.* as the freight. It was not proved that he professed to carry the manure or to receive the freight for his master. The servant who paid the 4*l.* said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom. Early in December, the prisoner returned home to Sittingbourne, and proposed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham, as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the 4*l.* received from Mr. Pye for the freight for the manure.

The jury found the prisoner guilty, as servant to Mr. Smeed, of embezzling 2*l.*

The question was whether, on the above facts, the prisoner could be properly convicted of embezzlement. (1)

(1) 24 & 25 Vict. c. 96, s. 68, enacts that "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or

1873

THE QUEEN v. CULLUM.

No counsel appeared for the prisoner.

E. T. Smith (with him *Moreton Smith*) for the prosecution. The prisoner received this freight either "for," or "on account of his master or employer," and therefore is within the terms of 24 & 25 Vict. c. 96, s. 68. The words, "by virtue of such employment," which were in the repealed statutes relating to the same offence, have been "advisedly omitted, in order to enlarge the enactment and get rid of the decisions on the former enactments:" Greaves' Crim. Law Consolidation Acts, p. 117.

[BOVILL, C.J. An alteration caused by the decision of *Rex* v. *Snowley* (1), which was a case resembling the present one.

BLACKBURN, J. How can the money here be said to have been received into the possession of the servant, so as to become the property of the master?]

The prisoner was exclusively employed by the prosecutor. With his master's barge he earned, and in the capacity of servant received, 4*l.* as freight, which, on receipt by him, at once became the property of his master: *Rex* v. *Hartley*. (2)

[BLACKBURN, J. But in this case the servant was disobeying orders. Suppose a private coachman used his master's carriage without leave, and earned half-a-crown by driving a stranger, would the money be received for the master, so as to become the property of the latter?]

Such coachman has no authority to receive any money for his master; the prisoner, however, was entitled to take freight.

[BOVILL, C.J. He was expressly forbidden to do so on this occasion.]

Can it be said that he may be guilty of embezzlement, if, in obedience of orders, he receives money, and yet not guilty of that crime if he is acting contrary to his master's commands? See note to *Reg.* v. *Harris* (3), in 2 Russell on Crimes, 4th ed., p. 453.

---

in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed. . . ."

(1) 4 C. & P. 390.

(2) Russ. & Ry. 139.

(3) Dears. Cr. C. 344.

[BLACKBURN, J. In suggesting that case to be erroneous, the editor seems to assume that the decision proceeded on the words, "by virtue of his employment," whereas it did not.

BRAMWELL, B. Suppose the captain of a barge let his master's vessel as a stand to the spectators of a boat-race, and took payment from them for the use of it?]

Such use would not be in the nature of his business.

[BLACKBURN, J. In the note to this section by Mr. Greaves, he remarks, "Mr. Davis (1) rightly says that 'this omission avoids this technical distinction;' but he adds, 'still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretences.' This is plainly incorrect." But in my opinion Mr. Davis was plainly correct, and Mr. Greaves wrong: *Reg.* v. *Thorpe.* (2)]

BOVILL, C.J. In the former Act relating to this offence were the words "by virtue of his employment." The phrase led to some difficulty, for example, such as arose in *Reg.* v. *Snowley* (3) and *Reg.* v. *Harris.* (4) Therefore, in the present statute those words are left out; and s. 68 requires instead that, in order to constitute the crime of embezzlement by a clerk or servant the "chattel, money, or valuable security . . . shall be delivered to, or received, or taken into possession by him, for or in the name or on account of his master or employer."

Those words are essential to the definition of the crime of embezzlement under that section. The prisoner here, contrary to his master's order, used the barge for his, the servant's, own purposes, and so earned money which was paid to him, not for his master, but for himself; and it is expressly stated that there was no proof that he professed to carry for the master, and that the hirer at the time of paying the money did not know for whom he paid it. The facts before us would seem more consistent with the notion that the prisoner was misusing his master's property, and so earning money for himself, and not for his master. Under those circumstances, the money would not be received "for," or "in the name of," or "on account of," his master, but for himself, in his

(1) Davis' Criminal Statutes, p. 70.
(2) Dears. & B. Cr. C. 562.
(3) 4 C. & P. 390.
(4) Dears. Cr. C. 344.

1873

THE QUEEN v. CULLUM.

own name, and for his own account. His act, therefore, does not come within the terms of the statute, and the conviction must be quashed.

BRAMWELL, B. I am of the same opinion. I think in these cases we should look at the substance of the charge, and not merely see whether the case is brought within the bare words of the Act of Parliament. Now the wrong committed by the prisoner was not fraudulent or wrongful with respect to money, but consisted in the improper use of his master's chattel. The offence is, as I pointed out during argument, only that which a barge-owner's servant might be guilty of, if, when navigating the barge, he stopped it, allowed persons to stand upon it to view a passing boat-race, charged them for so doing, and pocketed the money they paid to him. There is no distinction between that case and this, save that the supposititious case is more evidently out of the limits of the statute.

The use of this barge by the prisoner was a wrongful act, yet not dishonest, in the sense of stealing. But I will add, that I do not think this case even within the words of the statute. The servant undoubtedly did not receive the money "for" his master, nor "on account of" his master, nor "in the name" of his master. Nevertheless, I doubt extremely whether, on some future day, great difficulty may not arise as to the meaning of these expressions in s. 68, for I doubt whether, although the servant had used his master's name, he would have been within the terms of the Act of Parliament. "In the name of" his master is a very curious expression. Suppose a person in service as a carter had also a horse and cart of his own, and employed them to do some or other work, professing them to be his master's, and received hire for it "in the name of" his master, would that be embezzlement? Could he be rightly convicted under this section? I doubt it extremely. The words "in the name of" his master, although inserted with a desire to obviate difficulties, seem to me likely hereafter to raise them.

BLACKBURN, J. I am also of opinion that this conviction cannot be supported. Without criticising the words of the Act, let

us look at the object of passing it. The common law requires for the offence of larceny, not only animus furandi, but that there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servant and not otherwise, the servant could not be said to take his master's property because it came into his hands at the moment it was so received.

It was to meet this difficulty that the legislature said, "He who embezzles shall be guilty of stealing although the property has not become the master's except by the possession of the servant;" and in the original Act were the words "by virtue of his employment," which have been expressly omitted from the more recent statute; yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property, although not received otherwise than in the prisoner's capacity of clerk or servant. That is, I take it, the key to the meaning of the whole enactment, the technical objection as to the possession is removed. Therefore I think the opinion expressed by Mr. Davis, in his edition of these Acts (1), that "it still must be the master's money which is received by the servant," is correct enough, although the context, "and not money wrongfully received by the servant by means of false pretences or otherwise," is not quite accurate, because it may be received for the master, although obtained by false pretences. Now, in the present case, I cannot see how this was the master's property, or that the servant had authority to carry anything in this barge but the cargo he was directed to convey. He was actually forbidden to load this barge on the return voyage; he did load it, and very improperly earned money by the use of it; but in what sense he can be said to have received this sum for the use of his master I cannot understand. The test of the matter would really be this—if the person to whom the manure belonged had not paid for the carriage, could the master have said, "There was a contract with you, which you have broken, and I sue you on it?" There would have been no such contract, for the servant never assumed to act for his master, and on that ground his act does not come within the statute. I think that in no case could he have

(1) Davis' Criminal Statutes, p. 70.

1873

THE QUEEN v. CULLUM.

been properly convicted under the Act unless the money became that of the master.

ARCHIBALD, J. I am also of opinion that this conviction cannot be sustained. The only doubt in my mind was, whether the money earned by the use of the barge might not have been the money of the master, that is, if, instead of cash payment, the manure had been carried on credit there might not have been an implied contract to pay for the carriage to the master. But, on reflection, I think that, although carried in the master's barge, yet, as it was against his will, and carried by the servant in his own name, the contract must be taken to have been with the servant, so that under these circumstances no action by the owner against the proprietor of the manure could have been maintained; and that there was no receipt of the freight "for," or "on account of," or "in the name of" the master. The case does not come within the terms of the statute.

HONYMAN, J., concurred.

Conviction quashed.

Attorneys for the prosecution: *Tassell & Son, Faversham.*

May 3.

THE QUEEN *v.* NEGUS.

Embezzlement—"*Clerk or Servant*"—24 & 25 *Vict. c.* 96, *s.* 68.

The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him:—

Held, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 & 25 Vict. c. 96, s. 68.

CASE stated by the Assistant Judge of the Middlesex Sessions.

The prisoner was indicted for embezzling 17*l.* as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums

received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors.

Contrary to his duty he applied for payment of the above sum, and having received it he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that the prisoner was not a clerk or servant within the statute, but the learned judge refused to stop the case, and directed the jury to find him guilty.

The question was whether, upon the facts stated, the prisoner was a clerk or servant, and as such rightly convicted of embezzlement. (1)

No counsel appeared for the prisoner.

F. F. Lewis, for the prosecution. *Reg.* v. *Bowers* (2) somewhat resembles the present case, and is an authority in favour of the prisoner; but there the commission agent carried on a retail trade for himself at a shop, and so could not be deemed a clerk or servant of the merchants who supplied coal for him to sell.

[BOVILL, C.J. And here the prisoner might apply for orders whenever he thought most convenient.]

So might the traveller in *Reg.* v. *Bailey* (3); he was nevertheless held to be clerk or servant of his employers.

[BLACKBURN, J. For he was under their control, having to devote his whole time to the service.]

The stipulation that the prisoner was not to employ himself for any other persons than the prosecutors shews that they had control over him.

[BOVILL, C.J. Not at all He might go away to amuse himself whenever he liked.]

Reg. v. *Tite* (4); *Reg.* v. *Turner* (5) were also cited.

BOVILL, C.J. The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant," and, as

(1) See 24 & 25 Vict. c. 96, s. 68, ante, p. 29.
(2) Law Rep. 1 C. C. 41.
(3) 12 Cox Cr. C. 56.
(4) Leigh & Cave Cr. C. 30 L. J. (M.C.) 142.
(5) 11 Cox Cr. C. 551.

1873

THE QUEEN v. NEGUS.

such, rightly convicted of embezzlement. The learned assistant-judge of the Court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for the Court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to shew that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the *orders* of his employer so as to be under his employer's *control;* and on the case stated there does not seem sufficient to shew that he was subject to the employers' orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control him in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveller, and in *Reg.* v. *Tite* (1), and the other case cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to shew that it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent,—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

BRAMWELL, B. This conviction ought to be quashed unless we can see that the prisoner on the facts stated must have been clerk

(1) Leigh & Cave, Cr. C. 29; 30 L. J. (M.C.) 142.

or servant within the meaning of the Act of Parliament. I am of opinion that on the facts we cannot do so. Looking to principle we find that the statute was intended to apply—not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist. Erle, C.J., in *Reg.* v. *Bowers* (1) says, the cases decide "that a person who is employed to get orders and receive money, but who is at liberty to get those orders and receive that money when and where he thinks proper, is not a clerk or servant within the meaning of the statute." I think that is perfectly good law, consistent with all the authorities, and, applied here, it shews that the prisoner was not clerk or servant within the definition there given.

BLACKBURN, J. I am of the same opinion. The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance by itself alone enables us to say that he was a servant of the prosecutor.

ARCHIBALD, J., concurred.

HONYMAN, J. I agree. The question was not left to the jury to decide, and I cannot satisfy myself that the relationship of masters and servant certainly existed between the prosecutors and the prisoner. It does not appear that the prisoner was bound to obey every single lawful order. Possibly the masters might tell him to go somewhere, and he might justly refuse.

Conviction quashed.

Attorneys for the prosecution: *Allen & Son.*

(1) Law Rep. 1 C. C. R. 41, at p. 45.

END OF EASTER TERM, 1873.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXVI VICTORIA.

1873
June 7.

THE QUEEN *v.* GEORGE MIDDLETON.

Larceny—Taking invito domino—Post Office Savings Bank—24 & 25 Vict. c. 14.

The prisoner was a depositor in a Post Office Savings Bank, in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, stating in his notice the number of his depositor's book and the amount to be withdrawn. A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the Post-office at N., to pay the prisoner 10*s.* He went to that office, and handed his depositor's book and the warrant to the clerk. But the clerk, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed the latter amount upon the counter. The clerk entered the amount paid, 8*l.* 16*s.* 10*d.*, in the prisoner's depositor's book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an animus furandi, and knowing the money to be the money of the Postmaster-General :—

Held, by Cockburn, C.J., Bovill, C.J., Kelly, C.B., Blackburn, Keating, Mellor, Lush, Grove, Denman, and Archibald, JJ., and Pigott, B. (Martin, Bramwell, and Cleasby, BB., and Brett, J., dissenting) that the prisoner was guilty of larceny :

By Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., on the ground that even assuming the clerk to have the same authority to part with the possession of and property in the money which the Postmaster-General would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained animo furandi, there was both a taking and a stealing within the definition of larceny :

By Bovill, C.J., Kelly, C.B., and Keating, J., on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained animo furandi :

By Pigott, B., on the ground that the mistaken act of the clerk in placing the

money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny:

Held, by Martin, Bramwell, and Cleasby, BB., and Brett, J., that the prisoner was not guilty of larceny.

CASE stated by the Common Serjeant of London.

At the session of the Central Criminal Court held on Monday, the 23rd of September, 1872, George Middleton was tried for feloniously stealing certain money to the amount of £8 16*s.* 10*d.* of the moneys of the Postmaster-General.

The ownership of the money was laid in other counts in the Queen and in the mistress of the local post office.

It was proved by the evidence that the prisoner was a depositor in a Post Office Savings Bank, in which a sum of 11*s.* stood to his credit.

In accordance with the practice of the bank, he duly gave notice to withdraw 10*s.*, stating in such notice the number of his depositor's book, the name of the post office, and the amount to be withdrawn.

A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post office at Notting Hill to pay the prisoner 10*s.* He presented himself at that Post Office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed upon the counter a 5*l.* note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8*l.* 16*s.* 10*d.* The clerk entered the amount paid, viz., 8*l.* 16*s.* 10*d.* in the prisoner's depositor's book and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and upon being asked for his depositor's book, said he had burnt it. Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny, because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the animus furandi at the

1873

THE QUEEN v. MIDDLETON.

moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up.

A verdict of guilty was recorded, and the learned Common Serjeant reserved for the opinion of the Court for Crown Cases Reserved the question whether under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

Nov. 23, 1872. The Court [Kelly, C.B., Martin, B., Brett, Grove, and Quain, JJ.] reserved the case for the opinion of all the judges.

Jan. 25, 1873. The case was argued before Cockburn, C.J., Bovill, C.J., Kelly, C.B., Martin, Bramwell, Pigott and Cleasby, BB. Blackburn, Keating, Mellor, Brett, Lush, Grove, Quain, Denman, and Archibald, JJ.

No counsel appeared for the prisoner.

Sir J. D. Coleridge, A.G. (*Metcalfe* and *Slade* with him), for the prosecution.

The arguments and the cases cited sufficiently appear from the judgments.

Jan. 28. PER CURIAM. The majority of the judges think that the conviction ought to be affirmed, for reasons to be stated hereafter.

June 7. The following judgments were delivered:

BOVILL, C.J., read the judgment of Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., as follows:

This was a case in which the prisoner was indicted at the Central Criminal Court for feloniously stealing money, the property of the Queen or of the Postmaster-General. On the trial he was found guilty; but a case was reserved for the opinion of the Court of Criminal Appeal, which came on in the ordinary course before five judges; but on the argument they were not agreed, and the case was adjourned to be argued before all the judges. Pollock, B., was obliged to be absent at Chambers, and Quain, J., was unwell, but the other judges, fifteen in number, heard the case, and after time taken to consider, eleven of those fifteen judges were of

opinion that the conviction was right and ought to be affirmed; my Brothers Martin, Bramwell, Brett, and Cleasby dissenting.

Judgment was accordingly given in accordance with the opinion of the majority; but as it was thought important that the grounds of the decision should be accurately known, it was announced that the reasons of the judgment would on a subsequent day be delivered in writing.

I will now proceed to deliver the judgment of the Lord Chief Justice and my Brothers Blackburn, Mellor, Lush, Grove, Denman, and Archibald, which is as follows:—

The points raised by the case are in effect three. The uniform course of the indictments for larceny from the earliest times has been to allege that the prisoner feloniously stole, took, and carried away the goods of a named person; and Lord Hale, in his Pleas of the Crown, vol. i. p. 165, states with perfect accuracy that the words "feloniously stole and took" are essential to the crime.

In the present case the jury have found that the prisoner had animus furandi at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty; but the case states facts which raise the doubt whether, under the circumstances stated, this was a taking, and also whether it was a stealing, within the meaning put by the law on these averments in an indictment for larceny. And the circumstances which raise that doubt are as follows: Assuming that the clerk who actually was engaged in the transaction had such authority from the Postmaster-General that all he did is to be taken as done by the Postmaster-General, it is the first question whether the money can be said to have been taken by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is the Postmaster-General) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the Postmaster-General, intended that the property in the money should belong to the

1873

THE QUEEN v. MIDDLETON.

man before him, though he intended that in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of the taking the guilty intention to steal the money. A third question arises in the event of the two first questions being determined in favour of the prisoner; viz., whether the clerk really had such general authority as to represent the Postmaster-General, or whether his authority was not limited to paying the money specified in the letter of advice, viz. 10*s.*, which special authority, if it was so limited, he did not pursue.

The majority of the judges, eight in number, have formed their judgment on the decision of the two first points in favour of the Crown, which therefore renders it unnecessary for them to decide the last.

The Lord Chief Justice of the Common Pleas, the Lord Chief Baron, and my Brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments.

It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it all.

We now proceed to state the reasons on which we think that it ought to be held that there was, under the circumstances stated, a "taking" within the meaning of the averment in the indictment.

We agree, that according to the decided cases it is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief; and that, therefore, at common law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and felonious intention, converts them to his own use.

It is, to say the least, very doubtful whether this doctrine is either wise or just; and the legislature, in the case of bailees, have by statute enacted that bailees stealing goods, &c., shall be guilty of larceny, without reference to the subtle exceptions engrafted by

the cases on the old law. But in such a case as the present there is no statute applicable, and we have to apply the common law.

Now, we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking. We are not concerned at present to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in Russell on Crimes, 4th ed. vol. 2, p. 207; perhaps those that most clearly raise the point are *Rex* v. *Davenport* (1) and *Rex* v. *Savage* (2).

In the present case the finding of the jury, that the prisoner, at the moment of taking the money, had the animus furandi and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the possession of the money.

On the second question, namely whether, assuming that the clerk was to be considered as having all the authority of the owner, the intention of the clerk (such as it was) to part with the property prevents this from being larceny, there is more difficulty, and there is, in fact, a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows:—At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of the thing, that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now, it is established that where a bargain between the owner of the chattel has

(1) 2 Russell on Crimes, 4th ed. at p. 201.

(2) 5 C. & P. 143; 2 Russell on Crimes, 4th ed. at p. 201.

1873

THE QUEEN v. MIDDLETON.

been made with another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber, in *Clough* v. *London and North Western Ry. Co.* (1), where it is said, "We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Co. to Adams by the contract of sale; the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."

It follows obviously from this that no conversion or dealing with the goods, before the election is determined, can amount to a stealing of the vendor's goods; for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are, accordingly, many cases, of which the most recent is *Reg.* v. *Prince* (2), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged cheque payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property.

In the present case, the property still remains that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an innocent purchaser could have held the property. But let us suppose that a purchaser

(1) Law Rep. 7 Ex. 26, at pp. 34, 35. (2) Law Rep. 1 C. C. 150.

of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger, in *Chanter* v. *Hopkins* (1), when he says, "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it."

We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the animus furandi.

But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being that of larceny, though the intention was inoperative, and no property passed. In almost all the cases on the subject, the property had actually passed, or at least the Court thought it had passed; but two cases, *Rex* v. *Adams* (2), and *Rex* v. *Atkinson* (3), appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principles the cases can be supported if *Rex* v. *Davenport* (4) and the others involving the same principle are law; and though

(1) 4 M. & W. at p. 404.

(2) 2 Russell on Crimes, 4th ed. at p. 200.

(3) 2 East, P. C. 673.

(4) 2 Russell on Crimes, 4th ed. at p. 201.

1873

THE QUEEN v. MIDDLETON.

if a long series of cases had so decided, we should think we were bound by them, yet we think that in a Court such as this, which is in effect a court of error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

BOVILL, C.J., delivered the judgment of himself and KEATING, J., as follows:

The proper definition of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another, from any place, without any colour of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner. And the question for our consideration is, whether the facts of the present case bring it within that definition.

Under the Act for establishing Post Office Savings Banks, 24 & 25 Vict. c. 14, deposits are received at the post offices authorized by virtue of that Act, for the purpose of being remitted to the principal office (s. 1). By s. 2 the Postmaster-General is to give an acknowledgment for such deposits, and by the 5th section all moneys so deposited with the Postmaster-General are forthwith to be paid over to the Commissioners for the Reduction of the National Debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the Postmaster-General. By s. 3 the authority of the Postmaster-General for such repayment shall be transmitted to the depositor, who is to be entitled to repayment at a post office within ten days.

It appears to us that the moneys received by the postmasters at their respective offices, by virtue of this Act, are the property of the Crown or of the Postmaster-General, and that neither the postmasters, nor the clerks at the post offices, have any power or authority, either general or special, to part with the property in or even the possession of the moneys so deposited, or any part of them, to any person except upon the special authority of the Postmaster-General.

In this case the prisoner had received a warrant or authority

from the Postmaster-General, entitling him to repayment of 10*s.* (being part of a sum of 11*s.* which he had deposited) from the post office at Notting Hill, and a letter of advice to the same effect was sent by the Postmaster-General to that post office, authorizing the payment of the 10*s.* to the prisoner.

Under these circumstances we are of opinion that neither the clerk to the postmistress, nor the postmistress personally, had any power or authority to part with the 5*l.* note, three sovereigns, the half sovereign, and silver and copper, amounting to 8*l.* 16*s.* 10*d.*, which the clerk placed upon the counter, and which was taken up by the prisoner.

In this view the present case appears to be undistinguishable from other cases where obtaining articles animo furandi from the master of a post office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail bags by pretending to be the mail guard, as in *Rex* v. *Pearce* (1); the obtaining a watch from the postmaster, by pretending to be the person for whom it was intended, as in *Reg.* v. *Kay* (2) (where *Rex* v. *Pearce* (1) was relied upon in the judgment of the Court); and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in *Reg.* v. *Jones* (3), and in *Reg.* v. *Gillings* (4), were all held to be larceny.

The same principle has been acted upon in other cases, where the person having merely the possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them animo furandi; for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed, as in *Rex* v. *Longstreeth* (5), or obtaining goods through the misdelivery of them by a carman's servant through mistake to a wrong person who appropriated them animo furandi, as in *Reg.* v. *Little* (6), were, in like manner, held to amount to larceny.

(1) 2 East, P. C. p. 603.
(2) Dears. & B. Cr. C. 231; 26 L.J. (M.C.) 119.
(3) 1 Den. Cr. C. 188.
(4) 1 F. & F. 36.
(5) 1 Mood. Cr. C. 137.
(6) 10 Cox, Cr. C. 559.

1873

THE QUEEN v. MIDDLETON.

In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant, to whom the property had been intrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny.

The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods; for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny.

The delivery of goods by the owner upon an order which was in fact forged, as in *Reg.* v. *Adams* (1), the payment of money by a banker's cashier on a cheque which turned out to be a forgery, as in *Reg.* v. *Prince* (2), and the delivery up of pledges by a pawnbroker's manager by mistake and through fraud, as in *Rex* v. *Jackson* (3), are instances of this kind, and where the intent voluntarily to part with the property in the goods, by a person who had authority to part with the property in them, prevented the offence being treated as a larceny.

In the present case not only had the postmistress or her clerk no power or authority to part with the property in this money to the prisoner, but the clerk, in one sense, never intended to part with the 8*l.* 16*s.* 10*d.* to the person who presented an order for only 10*s.*, and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not, really intended for him, yet, with a full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use.

There was, therefore, as it seems to us, a wrongful and fraudulent

(1) 1 Den. Cr. C. 38. (2) Law Rep. 1 C. C. 150. (3) 1 Mood. Cr. C. 119.

taking and carrying away of the whole of this money by the prisoner, without any colour of right, animo furandi, and against the will of the real owner; and for these reasons, and upon the authorities before stated, we think the prisoner was properly convicted of larceny.

KELLY, C.B. The facts of this case simply stated are these. The prisoner, having deposited 10*s.* in the Post Office Savings Bank, and taken the necessary steps to withdraw it, proceeded to the post office and presented his order for the 10*s.* The post office clerk, having looked at the letter of advice for the payment of the 10*s.*, and at another letter of advice for the payment to another depositor of 8*l.* and a fraction, by mistake took up the 8*l.* odd destined to another depositor, and laid it upon the counter before the prisoner, who took up the money and went away with it, and applied it to his own use. The jury expressly found that he knew the 8*l.* odd did not belong to him, and that it did belong to the Postmaster-General, and that he took it up and carried it away with him animo furandi. Upon these facts and this finding I cannot bring myself to doubt that the prisoner was guilty of larceny. He saw the money upon the counter before him; he knew that it was not his own, and that it was another person's money; and he took it up and took it away with the intent to steal it. If he had gone into the office knowing that he had to receive 10*s.* and that somebody had to receive 8*l.*, and he had seen the 10*s.* and the 8*l.* lying upon the counter before him, and had taken away the 8*l.* animo furandi, no question could have been raised about his guilt. Does it then make any difference that the clerk placed the money before him and intended that he should take it?

If the money had belonged to the clerk, and the clerk had intended to pass the property in the money from himself to the prisoner, or if the money belonging to the Postmaster-General or the Queen, the clerk had been authorized to pass the property in that money to the prisoner, the case might have been different; but this money did not belong to the clerk, and he had no authority to pass the property in that money to the prisoner.

Reg. v. *Prince* (1) was cited, where a banker's clerk to whom a

(1) Law Rep. 1 C. C. 150.

1873

THE QUEEN v. MIDDLETON.

forged cheque was presented paid the money in ignorance of the forgery, and the receiver, who intended to defraud the banker of the money, was acquitted of larceny, on the ground that the clerk had authority to receive the cheque, and to dispose of the money which he had paid to the prisoner, and was the agent of the banker in so doing, so that the case was the same as if the banker himself, who was the owner of the money, had delivered it to the prisoner. There, however, the clerk was not only the agent of the banker, but he acted strictly in the discharge of his duty, for he had not only the authority of his employer to pay the money, but in the absence of any suspicion or reason to suspect that the cheque was forged, it was his duty to pay it, as he did pay it, with the banker's money. And there are other cases where the owner of a chattel delivers it to another, with the intent to pass the property, and the receiver has been acquitted of larceny.

But in this case the post office clerk was not the owner of the 8*l.*, and had no authority whatever to deliver that sum of money to the prisoner. The case appears to me to be the same, as indeed I suggested during the argument, as if the prisoner had left a watch at a watchmaker's to be repaired, and afterwards goes to the watchmaker's, sees his watch hanging up behind the counter and another watch of greater value and belonging to another person hanging beside it, and upon his asking for his watch the shopman by mistake hands him the watch belonging to another; he sees his own watch, he knows that the watch handed to him does not belong to him, but is the property of another, and the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received and taken away another man's property would have been guilty of larceny; that the shopman in such a case, and the clerk in this case, is in the condition of a mere stander by who, without authority and by mere mistake hands to him a chattel which he sees before him.

Even *Reg.* v. *Prince* (1) may be said to be founded on a fiction, for it is not true that the banker had authorized his clerk to pay his money to a forged cheque; but the fiction is more undisguised and palpable when it is asserted that the clerk was authorized by

(1) Law Rep. 1 C. C. 150.

the Postmaster-General to pay the sum of 8*l.* to a man who had presented an order or warrant for 10*s.*; and I must take leave to record my deliberate opinion that this creating of fictions, which, as the term imports, is the assuming to be true that which is untrue, and of which the direct consequence is to defeat justice, is a practice which in administering the law ought not to be extended. Moreover the case is further distinguishable from *Prince's Case*, on the ground of the decision in *Reg.* v. *Longstreeth* (1) where a carrier's servant delivered a parcel to one who received it animo furandi, knowing it not to be his own, and it was held that he had no authority to deal with the property in the goods, but only with the possession, and that the receiver was guilty of larceny. I think that decision governs the present case, and conclusively shews that if a servant delivers to the wrong person a chattel which it was no part of his duty and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing that it is not his own but belongs to another, and animo furandi, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny.

Upon these grounds I think the conviction should be affirmed.

PIGOTT, B. I agree in the judgment of the majority of the Court, except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not, under the circumstances here, prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent, because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner.

The case states that the clerk placed the money on the counter. He then entered the amount of it in the prisoner's book and stamped it. This, no doubt, gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error, and that the money could not really be

(1) 1 Mood. Cr. C. 137.

1873

THE QUEEN v. MIDDLETON.

intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it, and in fact to steal the money. The interval afforded him the opportunity of conceiving, and he did in fact conceive, the animus furandi, while as yet he had not got the money in his manual possession.

The dividing line may appear to be a fine one, but it is, I think, very distinct and well defined in fact, for it was with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter was required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter, intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed.

I desire to adhere to the law as stated in the 3rd Institute, page 110: "The intent to steal must be before it cometh to his hands or possession, for if he hath the possession of it once lawfully, though he hath animus furandi afterwards and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the animus furandi while the money was yet on the counter, and that at the moment of taking it up he knew the money to be the Postmaster-General's. The case is therefore very much like that of a finder, who, immediately on finding it, knows, or has the means of knowing, the owner, yet determines to steal it. (1) The same facts satisfy the requirements in the definition of larceny, that the taking must be invito domino. The loser does not intend to be robbed of his property, nor did the clerk in this case, and the prisoner's conduct is unaffected by the clerk's apparent consent in ignorance of its real nature. I affirm the conviction.

MARTIN, B. I am of opinion that the prisoner was not guilty of larceny. I have had an opportunity of reading the judgments

(1) 2 Russell on Crime, 4th ed. p. 169.

prepared by my Brothers Bramwell and Cleasby, and I think their reasoning both unanswered and unanswerable. [His Lordship stated the facts, and proceeded :—] I think both on principle and authority there has been no larceny.

As to authority, the act of the accused in *Reg.* v. *Prince* (1) was a grosser act, and more akin to larceny than that of the prisoner in this case; yet it was held not larceny. I defy any man to explain to any one not a lawyer the difference between the two cases. The distinction seems to me worthy of an ancient casuist.

And as to principle. It is true that in some cases the sound principle has been departed from. But the true principle is that laid down by Lord Coke in the 3rd Institute, p. 107: "Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the mere personal goods of another, neither from the person, nor by night in the house of the owner." And in examining this definition in detail, he says: "Secondly, it must be an actual taking; for an indictment, quod felonice abduxit equum, is not good, because it wanteth cepit. By taking, and not bailment or delivery, for that is a receipt and not a taking." The same principle is laid down in 2 Russell on Crimes, p. 152, 4th edit. by Greaves: "There must be an actual taking or severance of the goods from the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there be no trespass in taking the goods, there can be no felony in carrying them away." Now I am clearly of opinion that in this case there was no trespass, and that in the old stricter days of pleading, if an action had been brought it must have been an action of trover not trespass. I regret that in some cases there has been a departure from the old rules; and though I should follow, and should be bound to follow, these cases in any case to which their authority applied, in a doubtful case I think the true course is to have recourse to the old and settled principles of the law.

BRAMWELL, B. As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority, if the case turned on its own particular circumstances

(1) Law Rep. 1 C. C. 150.

1873

THE QUEEN v. MIDDLETON.

and no principle was involved. But in my opinion great and important principles not only of our law but of general jurisprudence arise here, on which I feel bound to state my views.

It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law for the prevention and remedy of wrongs. It is also a good rule not to make that a crime which is the act, or partly the act, of the party complaining: Volenti non fit injuria:—As far as he is willing, let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English common law. Obtaining goods by false pretences was no offence at common law. Ordinary cheating was not. Embezzlement, &c., by servants was not larcenous. Breaches of trust by trustees and bailees were not. So also fraudulently simulating the husband of a married woman, and having connection with her was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be invito domino.

Whether this law is good or bad is not the question. We are to administer it as it is. I think those statutes that have made offences of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence. But something was to be said in favour of the old law, viz., that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter, perhaps, may properly be made a crime; but it is a different crime from the other taking.

I say, then, that on principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be invito domino. That does not mean contrary to or against his will, but without it. All he need be is *in*vitus. This accounts for how it is that a finder of a chattel may

be guilty of larceny. The dominus is invitus. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistent with this, but which are brought within the rule indeed, but by reasoning which ought to have no place in criminal law—I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package, and cases where possession was fraudulently obtained, animo furandi, from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk re-vested the possession in the owner; and in the other case the obtaining of possession was a fraud, and so null; and that therefore in such cases the possession reverted to or remained in the true owner, and so there was a taking invito domino. So also cases where the custody is given to the alleged thief, but not possession or property, as when the price of a chattel delivered is to be paid in ready money: *Reg.* v. *Cohen.* (1) These are not exceptions to the rule, but are brought within it by artificial, technical, and unreal reasoning. But where the dominus has voluntarily parted with the possession, intending to part with the property in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so, nor whatever may be the mistake he committed; because in such case the dominus is not invitus. So also where the possession has been parted with in such way as to give the bailee a special property: see 2 Russell on Crimes, 4th ed. p. 191, citing 2 East, P. C. p. 682; *Reg.* v. *Smith* (2); *Reg.* v. *Goodbody.* (3) It is not necessary that the property should pass, the intent it should is enough: see *Rex* v. *Coleman.* (4)

But it is argued that here there was no intent to part with the property because the post office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described and give to Middleton what did not belong to him, yet he intended to do the act he did. What he did he did not do involuntarily nor accidentally, but on

(1) 2 Den. Cr. C. 249.
(2) 2 Russell on Crimes, 4th ed. p. 191.
(3) 8 C. & P. 665.
(4) 2 East P. C. 672.

1873

THE QUEEN v. MIDDLETON.

purpose. See what would follow from such reasoning. A. intends to kill B.; mistaking C. for B., he shoots at C. and kills him. According to the argument, he is not guilty of intentional murder; not of B., for he has not killed him; not of C., for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man in the dark gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is no rape, because it is not without her consent, yet she did not intend that a man not her husband should have connection with her. I have noticed this above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant.

To proceed with the present matter. If the reasoning as to not intending to give this money is correct, then, as it is certain that the post office clerk did not intend to give Middleton 10s., it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A. tells B. he has ordered a wine merchant to give B. a dozen of wine, B. goes to the wine merchant, bonâ fide receives, and drinks a dozen of wine. After it is consumed, the wine merchant discovers he gave B. the wrong dozen, and demands it of B., who, having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B., as B. could plead the wine merchant's leave and licence. But it is said that if B. knew of the mistake, and took the wine animo furandi, then he would have taken it invito domino; so that whether the dominus is invitus or not depends not on the state of his own mind, but of that of B.

It is impossible to say that there was a taking here sufficient to constitute larceny because the money was picked up, but that if it had been put in the prisoner's hand, there was not such a taking.

But for the point, then, I am about to mention, I submit the dominus was not invitus, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man, maybe what he did ought to be made criminal, but his act was different from a privy or forcible taking; he was led into temptation; the prosecutor had very much himself to blame, and I certainly think that Middleton, if punished, should be so on

different considerations from those which should govern the punishment of a larcenous thief.

But a point is made for the prosecution on which I confess I have had the greatest doubt. It is said that here the dominus was invitus; that the dominus was not the post office clerk, but the Postmaster-General or the Queen; and that therefore it was an unauthorized act in the post office clerk, and so a trespass in Middleton invito domino. I think one answer to this is, that the post office clerk had authority to decide under what circumstances he would part with the money with which he was intrusted. But I also think that, for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the dominus within this rule, at least when acting bonâ fide. It is unreasonable that a man should be a thief or not, not according to his act and intention, but according to a matter which has nothing to do with them, and of which he has no knowledge.

According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it animo furandi, it is no larceny; but if I tell my servant to take a shilling out of my purse, and he by mistake takes a sovereign, and gives it to the cabman, who takes it animo furandi, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, the cabman is guilty of larceny, but not if the husband gives it. It is said that there is no great harm in this; that a thief in mind and act has blundered into a crime. I cannot agree. I think the criminal law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain, and it is to be remembered that we must hold that to be law now which would have been law when such a felony was capital. Besides, juries are not infallible, and may make a mistake as to the animus furandi, and so find a man guilty of larceny when there was no theft and no animus furandi. Moreover, *Reg.* v. *Prince* (1) is contrary to this argument, for there the banker's clerks had no authority to pay a forged cheque if they knew it; they had authority to make a mistake, and so had the post office clerk.

(1) Law Rep. 1 C. C. 150.

1873

THE QUEEN v. MIDDLETON.

And suppose in this case the taking had been bonâ fide—suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum was given him—would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained.

No doubt the cases on this point are difficult, but I think not inconsistent with this opinion. In *Reg.* v. *Longstreeth* (1) the servant had no authority to change property in the thing delivered. So in *Rex* v. *Wilkins* (2) In *Rex* v. *Small* (3) the servant had authority to part with the possession only if he got a good half-crown, and the prisoner knew that. So in *Reg.* v. *Stewart* (4), where the reasoning of Alderson, B., is very important. In *Sheppard's Case* (5) the servant had no authority to sell the mare, and the prisoner and his confederates knew the mare was not the property of the servant. So in *Hench's Case* (6), the servant had no authority to pass property. In *Rex* v. *Pearce* (7) there was no intention to pass property. As to *Reg.* v. *Kay* (8), the reasoning by which the conviction is justified is, I repeat, such as ought not to exist in any law, most especially not in the criminal law. Imagine a judge passing sentence thus:—You have been properly convicted, and must be hung, because, "assuming that the seller had more than a bare charge, and was the bailee of it, yet his special property as such did not put an end to the general property of the true owner; and when he sent the watch away to a third person, addressed to the true owner, intending such person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and special property ceased, and the general property of the true owner became entirely unencumbered, and drew to it the possession, unless the postmaster became the bailee; but this he did not, for he had only a charge, and he became the servant of the true owner for the purpose of delivering it to him; and his possession was the possession of the true owner,

(1) 1 Mood. Cr. C. 137.
(2) 1 Leach, Cr. C. 520.
(3) 8 C. & P. 46.
(4) 1 Cox Cr. C. 174.
(5) 9 C. & P. 121.
(6) 2 Russell on Crimes, 4th ed. p. 215.
(7) 2 East, P. C. 603.
(8) Dears. & B. Cr. C. 231; 26 L.J. (M.C.) 119.

and could not be divested by the tortious acts of the prisoner." But, as is said in the note, in that case there was no intention to part with the property.

On these grounds I think the conviction was wrong. I need not profess my respect for those whose opinions are the contrary, but I feel bound, as I have said, to express mine, because I think very important principles are involved, and because I think it desirable to shew that though those whose opinion I share may be, and probably are, in the wrong, considering the numerous and weighty opinions the other way, there is more doubt in the case than has appeared to some, who seem to me to reason thus: The prisoner was as bad as a thief (which I deny), and being as bad, ought to be treated as one (which I deny also). To such reasoners I give the recommendation contained in an excellent article in the *Law Times* of the 25th of January, 1873, p. 228, where it is said, "A metropolitan county court judge might with advantage read and inwardly digest Paley's Moral and Political Philosophy, or some other approved treatise, in which the necessity for positive rules of general application, the doctrine of particular and general consequences, and the superior importance of, and regard due to, general consequences are clearly expounded."

BRETT, J. This case has been considered in three different ways. It has been said that the proper inference of fact to be drawn from the facts stated is, that the prisoner took and carried away the money without any consent to his so doing by the clerk, who was present; and that in such case the same rule of law is applicable as would be if the prisoner had taken and carried away the money in the absence of the clerk, and that the prisoner was therefore properly convicted. It has been said that the facts which are stated shew that, as matter of fact, the clerk, in this case, had no general authority to part with the property in the money intrusted to him on behalf of the Postmaster-General, but only a limited authority to part with a particular sum of money to the prisoner, which was not the sum of money he did part with, or to hand a sum similar to that which he in fact handed to the prisoner to some one else and not to the prisoner, and that, consequently, the prisoner was by law properly convicted of larceny, even though the clerk intended the prisoner

1873

THE QUEEN v. MIDDLETON.

to take and keep the money, or, in other words, even though the clerk intended to part with both the possession of and the property in the money. It has been said that, even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted, because no property in the money did, in point of law, at any time pass to the prisoner.

Any difference of opinion as to the first proposition can only arise upon a difference of view as to the proper inference of fact to be drawn. And I think also that the only difference of opinion with regard to the second proposition is a difference as to the true interpretation of the clerk's authority as matter of fact. But the difference as to the last proposition is a difference as to the criminal law. The difference of opinion which has arisen upon that proposition makes it necessary, as it seems to me, to refer to the definition of larceny, and to point out the exact part of that definition which is in question. The definitions which have been generally, and until now, I think, universally, accepted, are that larceny consists in "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner;" and again, "the felonious taking the property of another without his consent and against his will with intent to convert it to the use of the taker." The indictment for larceny is invariably founded upon these definitions, and comprises by necessary inference, if not in express terms, every part of them. It has always been held that each allegation of each part of these definitions is a material allegation in the indictment, and that every one of such allegations must be proved. Where criminal law is so accurately and so mercifully administered as it is in England, and with so firm a determination that no man shall be convicted of crime unless the prosecutor can prove that the case is brought in every particular within the recognized or enacted definition of the crime, it was to be expected that there would be, and it is the fact that there have been, critical decisions on every part of the defini-

tion of the crime of larceny. To some people, such decisions appear to be subtle, to others, carefully and rightly accurate. One part of the definition is, that the taking relied upon as the stealing should be a taking without the consent and against the will of the owner. That is the part of the definition which is in question in this case.

It has always been held to be a necessary part of the definition:— "Besides the animus furandi, it is necessary that the taking of the goods should also be without the consent of the owner, invito domino." This is of the very essence of the crime of larceny as well as essential in robbery: 2 Russell on Crimes, by Greaves, p. 189, 4th ed. The cases quoted are, as to robbery, *Rex* v. *McDaniel* (1) and, as to larceny, *Rex* v. *Egginton.* (2) Where the taking which is alleged to be felonious has occurred without the knowledge of the owner or of the person in charge, no difficulty can arise upon this part of the definition. The difficulties which have arisen have been where the goods have been delivered to the prisoner, or have been taken by the prisoner, with the consent of the owner or of the person in charge. In such cases a distinction has been made between the terms "delivery," "possession," and "property."

Where the goods are obtained by the prisoner, by willing delivery of them to him by the owner, the first proposition of law which has been affirmed is as follows: If it appear that although there is a delivery by the owner in fact, yet there is clearly no change of property nor of legal possession, but the legal possession still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are delivered has only the bare charge or custody of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use. The next received proposition is thus stated: Where there is a delivery of the goods by the owner, it is a settled and well-established principle that, if the owner part with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured.

And according to the common law, if the owner had not parted with the property in the goods, but only with the possession of

(1) Fost. 121. (2) 2 Leach, Cr. C. 913.

1873

THE QUEEN v. MIDDLETON.

them, the question of larceny remains open, and depends on the fact whether at the time of the alleged felonious taking the owner parted with the possession of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained by fraud, there may be larceny, assuming that the other parts of the definition are fulfilled. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and consequently not as a taking without the consent of the owner.

The propositions thus expressed leave open a question as to whether they mean the property in the goods has passed in consideration of law, or whether they mean that it was the intention of the owner that the property should pass. Now they are addressed to the question whether the thing alleged to have been stolen was taken without the consent of the owner. Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind. These propositions, therefore, are treating of a question of intention. If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is that he intends that the other should take the thing and keep it as his own; and it seems a contradiction in sense to say that the thing so delivered is taken from him without his consent. It seems to follow, that the real meaning of the propositions, when they speak of the owner parting with possession, or parting with the property, is as if they were written "if the owner intend to part with the possession, or intend to part with the property." All the cases are consistent with this view, though it is not expressed in terms in all. In *Reg.* v. *Harvey* (1), Alderson, B., asked the jury whether the prosecutor meant that the prisoner should leave the pigs with the lady, and either bring back the money or make a bargain. In *Reg.* v. *Johnson* (2), the jury found, under direction, that the prosecutor did not intend to part with the property in the cheque. In *Rex* v. *Parkes* (3), the question left was whether there was a sale by Mr. Wilson and a delivery of the goods with intent to pass the property. The jury found that Mr. Wilson did not intend to give credit. The conviction was

(1) 9 C. & P. 353. (2) 2 Den. Cr. C. 310; 21 L. J. (M.C.) 32.
(3) 2 Leach, Cr. C. 614.

indeed set aside, but on the ground, as I apprehend, that there was no evidence to justify the finding of the jury. In *Reg.* v. *Nicholson* (1), the conviction was held to be wrong by the judges, on a case reserved, on the ground that the property in the post bills and cash was parted with by the prosecutor under the idea that it had been fairly won. The ground of the judgment seems to me to be the intention or idea of the prosecutor. In the case of *Rex* v. *Adams* (2), it seems to me impossible to say that any property in the hat passed to the prisoner in consideration of law. The hat was delivered by the owner to an innocent messenger of the prisoner's, upon an assertion that he, the messenger, was sent by Paul. No property passed to Paul, because there was no delivery to him or to an agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat. But the act of taking relied on was the delivery of the hat by the prosecutor to the messenger, and the prosecutor intended to part with the property in the hat, or, in other words, that it should be taken away and kept. The judges, on a case reserved, held that there could be no felony. The decisions in the cases of *Rex* v. *Davenport* (3) and *Rex* v. *Savage* (4), seem to me to be founded entirely on discussions and considerations as to the intention of the prosecutor to pass the property.

In *Rex* v. *Atkinson* (5) the decision of the judges upon a case reserved is in terms that there was no felony, as it appeared that the property was intended to pass by the delivery of the owner. In the last case upon this point, the case of *Reg.* v. *Prince* (6), the proposition of law is thus stated by Blackburn, J.: "If the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny, and where the servant has an authority coequal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. The question has always been a

(1) 2 Leach, Cr. C. 610.

(2) 2 Russell on Crimes, 4th edit. p. 200.

(3) 2 Russell on Crimes, 4th edit. at p. 201.

(4) 5 C. & P. 143; 2 Russell on Crimes, 4th edit. at p. 201.

(5) 2 East, P. C. 673.

(6) Law Rep. 1 C. C. 150.

1873

THE QUEEN v. MIDDLETON.

question left to the jury, and has never hitherto been treated as a difficult question of the laws of property to be ruled by the judge. There is no trace in the books of the treatment now sought to be applied. The preamble to the statute 33 Hen. 8, c. 1, draws the distinction between goods taken by stealth 'and goods delivered by the owner willingly on being deceived by false tokens.' On consideration, then, of the authorities and of the part of the definition with which they dealt, and of the principle, I am of opinion that the proposition of law which would have been applicable in this case if the owner himself had been present is, when accurately stated, that where there is a delivery of the goods by the owner there can be no felony if the owner intend to part with the property in the goods, however fraudulent the means by which such delivery was procured."

When the delivery is made by a servant or agent of the owner, and the servant or agent has an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master: *Rex* v. *Jackson* (1) and *Reg.* v. *Prince.* (2) But if the delivery be by a servant or agent whose authority is limited, extending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession and not the property. Although the servant deliver the goods, intending to pass both possession and property, the prisoner may be convicted of larceny if he obtained the delivery by fraud: *Rex* v. *Longstreeth* (3), and many other cases: just as if by fraud he obtained delivery from the owner who intended by such delivery to give possession only, and not to pass the property. Such I believe to be the propositions of law which have been acted upon by a long series of most able and careful judges, and which, therefore, the present judges, in my opinion, have no authority to overrule.

It follows that I cannot agree with a judgment which decides that even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though

(1) 1 Mood. Cr. C. 119. (2) Law Rep. 1 C. C. 150.
(3) 1 Mood. Cr. C. 137.

the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. Upon the assumptions of fact thus stated I am of opinion that a prisoner could not be convicted according to law of larceny.

But if the clerk had only a limited special authority to part with only the possession of the money entrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner, but to another person; then I am of opinion that the prisoner, upon the assumption that the other parts of the definition of larceny were proved, was properly convicted of taking the money without the consent of the Postmaster-General, and properly convicted of larceny. This reduces the difference of opinion as to the first proposition which has been stated in this case to a difference of opinion as to what was the intention of the clerk with regard to delivering the money, and, as to the second proposition, as to what was the authority in fact of the clerk.

It seems to me that with regard to passing the possession of and property in the money entrusted to him he had the same authority as any other bank clerk. If he acted with strict accuracy his duty was to part with so much money as he was directed to part with by a genuine warrant, and to pay such sum of money to the person mentioned in such warrant. But he had authority to part not with any specific money, but with any of the money entrusted to him to any one of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money in order that they might keep it, that is to say, he had authority to pass to all such persons the possession of and the property in the money which he handed to them.

It seems to me, therefore, that as to passing the possession of and property in the money which he should deliver, he had a general authority to deal with the money as if in the place of the owner. It seems to me that the clerk intended to pass to the man who stood before him, that is to say the prisoner, the possession of

1873

THE QUEEN v. MIDDLETON.

and the property in the whole of the money which he laid on the counter for the prisoner to take up and entered into the prisoner's book as paid to the prisoner. And it seems to me to follow that the prisoner, notwithstanding his fraudulent knowledge of the clerk's mistake, and his fraudulent reticence, and his fraudulent acceptance of what he knew was not due to him, cannot legally be convicted of larceny.

I think, therefore, that the conviction was wrong.

CLEASBY, B. The case is not affected by the Acts of Parliament extending the criminal responsibility for larceny to bailees and others, because the prisoner was clearly not a bailee, so as to be guilty by subsequently converting the money to his own use, and he does not come within any other Act of Parliament. We have, therefore, to deal with a case in which a crime is charged which under the old law would have been punishable with death, and in early times generally received that punishment. The punishment was so severe, that the crime was strictly defined, and from the earliest times was not committed by fraudulently dealing with or appropriating the property of others, but was only committed when the property was taken by the accused, and it must be taken fraudulently, without the consent of the owner. It is laid down in Foster's Crown Law, p. 123: "It is of the essence of the offence of robbery and larceny that the goods be taken against the will of the owner." Coke, in the 3rd Institute, under the head of Larceny or Theft, p. 107, quotes the definition in the Mirror of Justice to the above effect, and he then gives the explanation of the words in the Mirror as follows, quoting from the translation: "It is said a taking, for bailing or delivery is not in this case." And Coke himself says afterwards, p. 107: "Secondly, it must be an actual taking: . . . . by taking, and not bailment or de-delivery, for that is a receipt, and not a taking, and therewith agreeth Glanvil, Furtum non est ubi initium habet detentionis per dominum rei."

This continues the law, except so far as altered by statute. But the taking does not necessarily mean a taking by force or surreptitiously, and the cases as to what constitutes a taking occupy nearly one hundred pages in Russell on Crimes, vol. ii., from p. 152,

4th. ed. They seem to establish, first, that where delivery is fraudulently obtained from any person having no authority to deal with the property, it is a taking from the owner. The instances of this are obtaining delivery from a mere servant by a false representation of the master's orders: obtaining delivery from a carrier whose only authority is to change the possession from A. to B., by a false representation of being B. Another instance, more like the present, because there is a mistake, where a person leaves his umbrella, or cloak, or watch, with any person to be returned on application, and he afterwards fraudulently identifies as his own a more valuable umbrella or cloak belonging to another person. This would be a taking, because the parties had no transaction or dealing connected with property, the person in charge having only an authority to return to each person his chattel.

Secondly, the cases establish that, when the owner himself delivers them, but only for the purpose of some office or custody, as of a man delivering sheep to his shepherd (an instance put by Coke), if the shepherd who has them in his charge fraudulently converted them to his own use, it would be a taking, because the right of possession (much less of property), was not for an instant changed.

But the cases also establish that, where there is a complete dealing or transaction between the parties for the purpose of passing the property, and so the possession parted with, there is no taking, and the case is out of the category of larceny.

Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our laws in drawing a dividing line, and holding that, whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated, and uncertain, and difficult to ascertain. And this agrees with Hawkins's opinion: Pleas of the Crown, Book 1, c. 33, s. 3; where (in dealing with the question of what shall be a felonious taking), after pointing out that, unless there has been a trespass in taking goods, there can be no felony in carrying them away, he adds: "And herein our law differs from the civil, which, having no capital punishment for bare thefts, deals with offences of

1873

THE QUEEN v. MIDDLETON.

this kind (that is, fraudulent appropriation of things not taken), as in strict justice most certainly it may; but our law, which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil, than criminal offences."

I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases shew, no doubt, beyond question, that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not shew the converse, viz., that when the property does not pass, there is larceny. On the contrary, they appear to me to shew that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case, than expressly decide it. For how can there be a taking against the will of the owner, where the owner hands over the possession, intending by doing so to part with the entire property?

As far as my own experience goes, many of the cases of fraudulent pretences which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretence that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct, upon cases reserved for the judges, that in such cases there is no larceny. In *Reg.* v. *Adams* (1), the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker:

(1) 1 Den. Cr. C. 38.

"Have the goodness to give the bearer ten good thick sides of bacon, and four good showy hams, at the lowest price. I shall be in town on Thursday next, and will come and pay you.

"Yours respectfully,

"T. Parker."

Aston, believing the note to be the genuine note of Parker (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offence was larceny, the judges were all of opinion that the conviction was wrong. *Rex* v. *Coleman* (1) is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbour for it; and it was held not to be a case of larceny. *Rex* v. *Atkinson* (2) was a similar one, and the prisoner was convicted; but on a reference to the judges after conviction, all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner.

There is also a large class of cases in which it has been held that there was no taking so as to constitute larceny, where the possession had been wholly parted with (not by way of mere charge or custody, as in the case of the shepherd or butler), though there was no intention to pass the property. And the distinction has been drawn between delivering yarn to a weaver to work up on the employer's premises, in which there is no complete parting with the possession, and the delivery to a weaver to take home and work up there. In the latter case the possession is wholly parted with, and (previous to recent legislation) there could be no larceny by subsequent appropriation. (3) So the giving cloth to a tailor to make into a coat. In like manner, delivering a horse to be agisted at so much a week: *Reg.* v. *Smith* (4); or cattle to a drover to be sold on the road if he could do so: *Reg.* v. *Goodbody.* (5) In all these cases, the legal possession being wholly transferred, there could be no taking in the nature of a trespass, and they were not formerly cases of larceny.

I will only further refer to the case of *Reg.* v. *Barnes* (6), and I

(1) 2 East, P. C. p. 672.
(2) 2 East, P. C. p. 673.
(3) 2 East, P. C. p. 632.
(4) 2 Russell on Crimes, 4th ed. at p. 191.
(5) 8 C. & P. 665.
(6) 2 Den. Cr. C. 59; 20 L. J. (M.C.) 34.

1873

THE QUEEN v. MIDDLETON.

do so from its resemblance to the present case. The prisoner was indicted for larceny. He was clerk to the prosecutors, and it was his duty to pay dock and town dues. He fraudulently represented that a sum of 3*l.* 10*s.* 4*d.* was required to make the payments, when only 1*l.* 3*s.* was wanted, and obtained the larger sum, intending to appropriate the difference to his own use. Upon a case reserved it was held not to be larceny. The main difference between that case and the present is that the prisoner there dishonestly made use of falsehood to obtain the larger amount. In the present case he obtained the larger amount by dishonestly omitting to correct the mistake of the postmistress. In both cases the overpayment was made under a mistake of the facts.

In my opinion all the authorities warrant the proposition of law as laid down by my Brother Blackburn in the last reported case on the subject, *Reg.* v. *Prince* (1) (which was, like the present, a case of payment under a mistake of fact). "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny, and where the servant has an authority co-equal with the master's, and parts with his master's property, such property cannot be said to have been stolen, inasmuch as the servant intends to part with the property in it."

With those authorities before me, I cannot accept as the proper test, not the intention of the owner to deliver over the property (which is a question of fact), but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to me to be a novelty at variance with the definition of larceny, which makes the mind and intent of the owner the test, and irreconcileable with the manner in which these cases have always been dealt with.

And it is of great importance to abide by cases already decided by the judges, because the law of larceny being the same in Ireland as in England, the decisions ought to be the same; and the judges in Ireland may feel themselves bound by adjudged cases (recognized in all the text books and long acted on), though we may assume to overrule them; and so there may be an undesirable divergence of opinion. And it must be borne in mind that

(1) Law Rep. 1 C. C. 150.

the cases which must be overruled if this new test be adopted (*Rex* v. *Adams* (1), *Rex* v. *Coleman* (2), *Rex* v. *Atkinson* (3)), are not decisions of the Court for Crown Cases Reserved, but unanimous decisions of all the judges upon cases submitted to them.

However desirable it may be that the law should now be changed, I am not at liberty to set aside or qualify the rule of law so long settled, and to say that an acquisition of a chattel by dishonest means is now a felony. Nor do I feel myself at liberty to leave such a question to the jury. If the transaction is of the nature which I have mentioned, the dishonest mind of the person receiving is immaterial upon the charge of felony, and ought not therefore to be left to the jury; otherwise the jury would be misled by their disapproval of anything dishonest into the erroneous conclusion of a felonious intent to do that which is not a felony. But the person with whom the transaction takes place, and from whom the delivery is received, must be a person qualified to enter into the transaction, and capable of passing the property.

In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose (inter alia) of making payments and taking receipts. He is called the clerk, and therefore his act, within the general scope of his authority, would be the act of the postmistress. But, it is suggested, that the postmistress was not in any sense the agent of the Postmaster-General, but had in each case a separate and particular authority to make the payment. And upon looking into the Act of Parliament, 24 & 25 Vict. c. 14, I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of 10*s.* to the prisoner. And if, at the time when the payment was made, the postmistress or clerk had done some act wholly out of the authority, as, for instance, payment to a stranger, I should feel a difficulty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person entitled to be paid the 10*s.* for which he applied under the order, and the authority was to pay to him that sum. The exercise of power in

(1) 2 Russell on Crimes, 4th ed. at p. 200. (2) 2 East, P. C. p. 672.
(3) 2 East, P. C. p. 673.

1873

THE QUEEN v. MIDDLETON.

making too large a payment on behalf of the Postmaster-General was, therefore, only excessive, and (according to the ordinary rule in the exercise of power) was valid, so far as it was within the power, the excess being clearly separable.

This is not the case of the postmistress being authorized to deliver one bag of money to one person and another bag of money to another person. In that case the prisoner knowingly getting the wrong bag would get something to which he had no colour of title. The authority here is to enter into an account with the prisoner, by paying him a certain amount and making a corresponding alteration in the balance. And this is done; the payment is made and the corresponding alteration in the balance, but there is a mistake in the amount paid, and so in the balance, and it becomes really the ordinary case of payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner entered and left the office in the same character, viz., that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount.

The prisoner was, therefore, entitled to be paid the 10*s.* out of the money handed to him, and that being so, there is a technical objection to the conviction, that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained.

But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10*s.* out of the amount, and to have handed the rest to the clerk. He ought, at the same time, to have handed back his book and had it corrected, because it charged him with the receipt of 8*l.* odd, but his omission to do this does not, in my opinion, involve him in the charge of larceny.

There was no mistake in the person, because the prisoner handed in his order and also his deposit book; and if the clerk had known him well it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated,—looking at the wrong order.

There was no mistake in the amount. I mean it was not the case of the clerk handing him a 100*l.* note when he intended to hand a 5*l.* note, or, unknowingly, two notes instead of one. He intended to pay the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the transaction by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake and the prisoner snatching it up and running away with it for the purpose of preventing the mistake from being set right.

The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10*s.*, and the clerk thought he was entitled to more and paid him accordingly, and this overpayment might have been afterwards adopted by the postmaster, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake; he would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of overpayment; but the intention was to do the act of paying the larger sum, because it was thought to be a proper one.

This is the answer to one argument addressed to us, viz., that the prisoner took up what was intended for another, and not for him, and therefore there was a taking invito domino. The conclusion of law would be quite correct if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and would have done so, if he had properly informed himself of the facts; but, unfortunately for the prisoner, the clerk did not properly inform himself of the facts, and, therefore, he intended the prisoner to receive the larger amount. The clerk intended A. to receive what he ought to have intended B. to receive, but it was not the less his intention that A. should receive what he handed over to him. There was only one transaction, and only two parties to it, the clerk and the prisoner, and his fault was the work of an instant,

1873

THE QUEEN v. MIDDLETON.

and might, to an ignorant and illiterate person, be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense at once see and correct the mistake.

I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and, by mistake, a larger quantity than was paid for may be put in the package and he may take them away. Or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the animus furandi? I think not; I think such cases are out of the area of felony, and, therefore, the animus furandi is inapplicable, and ought not to be left to the jury. And any conclusion, founded upon the finding of the jury upon a question which ought not to be left to them, must be erroneous, because the foundation is naught. I think the conviction was against law and ought to be quashed.

Conviction affirmed.

Attorney for prosecution: *The Solicitor to the Post Office.*

May 31.

THE QUEEN *v.* REBECCA GOLDSMITH.

False Pretences—Receiving—Indictment—Aider by Verdict—24 & 25 *Vict. c.* 96, *ss.* 88, 95—7 *Geo.* 4, *c.* 64, *s.* 21—14 & 15 *Vict. c.* 100, *s.* 25.

The prisoner was indicted, under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretences. The indictment did not set out the false pretences. At the trial, at the close of the case for the prosecution, it was objected, on behalf of the prisoner, that the indictment was bad, because it did not set out the false pretences. The prisoner was convicted:—

Held, that the objection must be taken to have been made after verdict in arrest of judgment; and that after verdict the indictment was good.

CASE stated by the Deputy Recorder of London.

At a Session of the Central Criminal Court, held on Monday,

1873

THE QUEEN v. GOLDSMITH.

the 5th of May, 1873, Rebecca Goldsmith was tried, upon an indictment containing fourteen counts, for various misdemeanours. The thirteenth count was as follows:—

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said Rebecca Goldsmith afterwards, to wit, in the year of our Lord, 1872, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court, unlawfully, did receive and have divers articles of jewellery, to wit (here followed a list of the goods alleged to have been unlawfully received), of the goods and chattels of the said Charles Drayson and others, which said goods and chattels, in the count aforesaid, had lately before then been unlawfully, and knowingly, and fraudulently obtained of and from the said Charles Drayson and others by means of certain false pretences, with intent to defraud: She, the said Rebecca Goldsmith, at the time she so as aforesaid unlawfully received and had the same goods and chattels, then and there well knowing that the same goods and chattels had been obtained by means of certain false and fraudulent pretences, with intent to defraud, as in this count before mentioned, against the peace of our said Lady the Queen, her Crown, and dignity."

The fourteenth count was in the same form, for receiving goods belonging to another owner.

At the close of the case for the prosecution, *Mr. Giffard, Q.C.*, and *Mr. Poland*, on behalf of the prisoner, objected that the 13th and 14th counts were bad, because they did not set forth the false pretences by means of which the goods had been obtained, and that consequently it did not appear that those false pretences were within the statute 24 & 25 Vict. c. 96, s. 88. (1)

(1) By 24 & 25 Vict. c. 96, s. 88: "Whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour. . . ."

By s. 95: "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanour by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanour. . . ."

By 7 Geo. 4, c. 64, s. 21: ". . . . Where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment pre-

1873

THE QUEEN v. GOLDSMITH.

Mr. Metcalfe, Q.C., for the prosecution, contended, first, that it was unnecessary, in a substantive charge of receiving goods obtained by false pretences, to set forth the specific false pretences by which they had been obtained; secondly, that the allegation in the indictment that they had been unlawfully, knowingly, and fraudulently obtained by false pretences, with intent to defraud, must be taken to mean that they had been obtained by false pretences which were unlawful and fraudulent within the statute; and, thirdly, that even if it were necessary, as matter of form, to set out the false pretences, yet the objection was too late, and ought to have been taken before the plea by virtue of 14 & 15 Vict. c. 100, s. 25.

The prisoner was found guilty on the 13th and 14th counts only, and, doubting whether these two counts were good in form, and also doubting whether, if they were not good, the objection was taken in proper time, the learned Deputy Recorder reserved for the decision of the Court for consideration of Crown Cases the two questions:

First, whether the two counts were good in form, and, second, if they were not good, whether the objection was too late.

If the counts were bad, and the objection was in time, the conviction was to be annulled; but, if the counts were good, or the objection was too late, the conviction was to be affirmed.

Giffard, Q.C. (*Poland* with him), for the prisoner. An indictment for obtaining goods by false pretences must set out the pretences: *Rex* v. *Mason* (1). And s. 95 of the Larceny Act, creating the offence of receiving, does so by express reference to s. 88, as to obtaining, and must be similarly construed. The 7 & 8 Geo. 4, c. 64, s. 21, does not help, for the words of the statute are not followed, the word "unlawfully" being omitted.

---

scribed by the statute, if it describe the offence in the words of the statute."

By 14 & 15 Vict. c. 100, s. 25: "Every objection to any indictment, for any formal defect apparent on the face thereof, shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every Court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

(1) 2 T. R. 581.

And the statute is to be read as if after "false pretences" there followed the words "of an existing fact"; 2 Russell on Crimes, 4th ed. p. 554, n. Nor does 14 & 15 Vict. c. 100, s. 25, apply, for this is not a formal defect. Every allegation in the indictment might be true and yet no offence be committed. He also cited 2 Hale. P. C. 192; *Sill* v. *The Queen* (1); *Reg.* v. *Wilson* (2); *Reg.* v. *Martin* (3); *Rex* v. *Turner* (4); *Rex* v. *Ryan* (5); *Rex* v. *Davis* (6); *Reg.* v. *Gray.* (7)

Metcalfe, Q.C. (*Straight* with him), cited *Heymann* v. *The Queen* (8); *Reg.* v. *Blake* (9); *Nash* v. *The Queen* (10); *Reg.* v. *Watkinson* (11); *Rex* v. *Gill* (12); *Sydserff* v. *The Queen.* (13)

BOVILL, C.J. That an indictment for obtaining goods by false pretences must set out the false pretences was long ago decided. The contention here is, that the present indictment for receiving goods knowing them to have been obtained by false pretences is bad for not doing so also. It must be observed that no objection was taken before plea, but issue was joined and the jury charged. But at the close of the case for the prosecution, and before verdict, the present objection was taken. The learned judge who tried the case was not bound to give any effect to such an objection taken at that stage. If he thought the objection clearly a good one, he might have quashed the indictment. If he thought the matter doubtful he might leave the party to his writ of error, or reserve the point for this Court. In this case the Deputy-Recorder did not quash the indictment, but reserved the point for this Court, not whether the indictment ought to be quashed, but whether the count is a good count. It is true the objection was in fact taken before verdict, but we can only give effect to it as an objection taken after verdict. The judge at the trial could have given effect to it only by quashing the indictment or arresting the judgment;

(1) 1 E. & B. 553; 22 L. J. (M.C.) 41.
(2) 2 Mood. Cr. C. 52.
(3) 8 Ad. & E. 481.
(4) 1 Mood. Cr. C. 239.
(5) 2 Mood. Cr. C. 15.
(6) 1 Leach Cr. C. 65, n.
(7) Leigh & Cave's Cr. C. 365; 33 L. J. (M.C.) 78.
(8) Law Rep. 8 Q. B. 102.
(9) 6 Q. B. 126.
(10) 4 B. & S. 935; 33 L.J. (M.C.) 94.
(11) 26 L. T. (N.S.) 853.
(12) 2 B. & Ald. 204.
(13) 11 Q. B. 245.

1873

THE QUEEN v. GOLDSMITH.

and as no question is reserved as to quashing the indictment, we must treat it as a motion in arrest of judgment. I say this because this is not a case for annulling the conviction, which must stand. After the attention of the Deputy-Recorder had been called to the matter, we must take it that he charged the jury properly; and after verdict, we must assume that the jury found correctly as to the matters alleged in the indictment.

Such being the mode in which the objection arises, the objection is that the 13th and 14th counts do not set out the false pretence by which the goods were obtained which the prisoner is charged with receiving. That was the objection raised at the trial; and we ought to confine ourselves strictly to the question raised at the trial and reserved for this Court. This objection does not appear upon the face of the counts, for so far as the words go the false pretences might or might not be such as fall within the provisions of the statute. The worst that can be said of the indictment is, that it is uncertain. But the judge would be bound to direct the jury what kind of false pretences are requisite to bring the case within the statute. Then the statute 24 & 25 Vict. c. 96, s. 95, makes it a misdemeanour to "receive any property the obtaining whereof is made a misdemeanour by the Act, knowing the same to have been unlawfully obtained." And those words have reference to s. 85, by which "whosoever shall by any false pretence obtain from any other person any chattel, &c., with intent to defraud, shall be guilty of a misdemeanour." The section in question is a substantial re-enactment of 7 & 8 Geo. 4, c. 29, s. 53, and under that there has been a uniform course of pleading precedents in the books, shewing clearly that it has not been usual to set out the false pretences in such an indictment. And we ought not to hold such a series of precedents to be wrong, without being very clear upon the point. But as here the question arises after verdict, the case is concluded by 7 Geo. 4, c. 64, s. 21, by which, "where the offence charged has been created by any statute, the indictment shall after verdict be held sufficient, if it describe the offence in the words of the statute." Here, so far as the objection taken at the trial and reserved for us is concerned, the words of the statute are followed.

Independently, however, of the statute, the case of *Heymann* v.

The Queen (1) is an authority to shew that at common law this indictment would be sufficient after verdict.

It was further argued that the objection taken was cured, as a formal defect, by 14 & 15 Vict. c. 100, s. 25. In the view I take of the case, it is unnecessary to decide this point. The objection, if a valid one at any time, is cured after verdict. The judgment cannot be arrested, but the conviction must stand.

BRAMWELL, B. The objection here raised is that the indictment shews no offence. In strictness the objection was taken at the wrong time. A question as to an indictment may be raised by demurrer, by motion to quash, or by motion in arrest of judgment. Had the present objection been taken on demurrer or motion to quash, I am not prepared to say the count would have been good. But upon principle, the defect, if any, is cured by verdict. The rule is laid down in Serjeant Williams' note to *Stennel* v. *Hogg* (2): "Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." In the present case, if on the trial of the principal offender, false pretences had been proved amounting only to future promises or the like, is it to be supposed that the judge would have allowed the case to go to the jury? The case of *Rex* v. *Mason* (3) has been cited; but I agree with the remark of Mellor, J., in *Heymann* v. *The Queen* (4), that that case and the others like it are virtually overruled.

We must take it that the objection raised at the trial was made with a continuando, so as to be available as a motion after verdict in arrest of judgment; otherwise we should have no jurisdiction. My ground of decision is that the defect, if any there be, is cured

(1) Law Rep. 8 Q. B. 102.

(2) 1 Notes to Saunders by Williams, at p. 261.

(3) T. R. 581.

(4) Law Rep. 8 Q. B. at p. 103.

1873

THE QUEEN v. GOLDSMITH.

by verdict. If the matter were one in our discretion I should not arrest the judgment.

I think for the future it would be better that such objections should be formally taken by motion to arrest judgment.

CLEASBY, B. I think this case clearly falls within the rule which has been cited by my Brother Bramwell from Williams' Saunders, and the principle laid down by the Queen's Bench in *Heymann* v. *Reg.* (1) "It is a general rule of pleading at common law—and I think it necessary to say, where there is a question of pleading at common law there is no distinction between the pleadings in civil cases and criminal cases—where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." This is at most the case of a defective averment, and it must be taken, after verdict, to have been proved in the only sense in which it ought to have been averred.

GROVE, J. I think the case falls within the rule referred to by my Brothers Bramwell and Cleasby.

ARCHIBALD, J., concurred.

Conviction affirmed.

Attorneys for prisoner: *Lewis & Lewis.*
Attorneys for prosecution: *Wontner & Sons.*

(1) Law Rep. 8 Q. B. at p. 105.

END OF TRINITY TERM, 1873.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICH. TERM, XXXVII VICTORIA.

THE QUEEN *v.* BARRATT. 1873 *Nov.* 15.

Rape—Idiotcy of Prosecutrix.

On an indictment for rape, it was proved that the prosecutrix was fourteen and a half years old, and that ever since she was six weeks old she was blind and wrong in her mind, that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself, that if placed in a chair by anyone she would remain there till night, passing her evacuations and water in the chair, that if told to lie down she would do so, that she could not communicate to her friends what she wanted, that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work. It was further proved that the father of the prosecutrix, on returning home one day, looked through the window of the sitting-room and saw the prisoner lying on the prosecutrix on a couch in the room, on which she had been placed by her sister, whom the prisoner then sent on an errand to a distance, and who desired the prosecutrix to lie on the couch till her return. On going into the room he found the prisoner standing up at the end of the couch, buttoning up his trowsers, while the prosecutrix was lying quietly on the couch. There were no external marks of violence on the person of the prosecutrix. The learned judge told the jury that if the prisoner had connection with the prosecutrix by force, and if she was in such an idiotic state that she did not know what the prisoner was doing, and if the prisoner was aware of her being in that state, they might find him guilty of rape. But if from animal instinct she yielded to the prisoner without resistance, or if the prisoner from her state and condition had reason to think she was consenting, they ought to acquit him. The jury found the prisoner guilty of an attempt at rape:—

Held, that the prisoner was rightly convicted. *Reg.* v. *Fletcher* (Law Rep. 1 C. C. 39) explained and distinguished.

CASE stated by Honyman, J.

The prisoner, Robert Barratt, was tried at the Leeds Summer Assizes, 1873, for a rape on Mary Redman.

1873

THE QUEEN v. BARRATT.

It was proved by the relations of Mary Redman that she was fourteen and a half years old, and that ever since she was six weeks old she was blind and wrong in her mind, that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself, that if placed in a chair by any one she would remain there till night, passing her evacuations and water in the chair, that if told to lie down she would do so, that she could not communicate to her friends what she wanted, that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work, that the prisoner had known Mary Redman and her family about two years, and knew that she was not right in her mind.

It was proved by a surgeon that there were no external marks of violence, but that in his opinion there had been recent connection, and he thought she had been in the habit of having connection.

Mary Redman was brought into Court but not sworn. She was evidently idiotic, and the learned judge found it impossible to communicate with her. When he spoke to her she evidently heard a sound and grinned, but made no reply except a vacant laugh, and played with her handkerchief, which she had dressed up in the shape of a doll, and mumbled in her mouth.

It was proved by the evidence of her father that, on returning home one day he looked through the window of the sitting-room and saw the prisoner lying on Mary Redman, on a couch in the room on which she had been previously placed by her sister, whom the prisoner then sent on an errand to a distance, and who desired Mary Redman to lie on the couch till her return, and that on going into the room he found the prisoner standing up at the end of the couch buttoning up his trowsers, while Mary Redman was lying quietly on the couch. The prisoner asked the father not to say anything about it.

Beyond this there was no evidence to shew under what circumstances the prisoner had or attempted to have connection with the girl.

For the prisoner it was submitted that there was no sufficient evidence of penetration, or that what took place was without the girl's consent or against her will.

The learned judge declined to stop the case, but reserved for the Court of Criminal Appeal the question whether he ought under the circumstances to have directed the jury to acquit the prisoner.

The learned judge told the jury that if the prisoner had connection with the girl by force, and if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl from animal instinct yielded to the prisoner without resistance, or if the prisoner from the girl's state and condition had reason to think the girl was consenting, they ought to acquit him.

The jury found the prisoner guilty of an attempt at rape.

The question for the opinion of the Court of Criminal Appeal was, whether, under the circumstances, the learned judge ought to have directed the jury to acquit the prisoner. If so, the conviction was to be quashed, or otherwise, affirmed.

No counsel appeared for the prisoner.

Forbes, for the prosecution. There was evidence to go to the jury. The case is governed by *Reg.* v. *Fletcher*. (1) The second case of *Reg.* v. *Fletcher* (2) is distinguishable, for in that case the mental incapacity was much less complete. In each case the question must be one of degree. He also cited *Reg.* v. *Barrow* (3); *Reg.* v. *Camplin* (4); *Reg.* v. *Lock* (5).

KELLY, C.B. I am clearly of opinion that the prisoner was rightly convicted. I think it quite unnecessary for us to go through the various cases upon the subject. I entirely concur in the ruling of Willes, J., as cited in *Reg.* v. *Fletcher* (1), and with the other judges who have had to deal with the question. And consequently the prosecutrix here being incapable of expressing assent or dissent, and the prisoner having attempted to have connection with her without her consent, the attempt of the prisoner was an attempt at rape.

(1) Bell Cr. C. 63; 28 L. J. (M. C.) 85.
(2) Law Rep. 1 C. C. 39.
(3) Law Rep. 1 C. C. 156.
(4) 1 Den. Cr. C. 89.
(5) Ante, p. 10.

1873

THE QUEEN v. BARRATT.

As to the second case of *Reg.* v. *Fletcher* (1), all I can say is that I can myself see no solid distinction between it and the earlier cases. But, as those who decided the case thought there was such a distinction, I say nothing further upon it.

BLACKBURN, J. I am of the same opinion. I think the rule laid down in the first case of *Reg.* v. *Fletcher* (2) was quite right, and I do not think that, in the second case of the same name, the Court intended to depart from it. In every case the question must be, whether there is sufficient evidence to support the charge, and where mental incapacity is involved the question must be one of degree. Now in the first case of *Reg.* v. *Fletcher* (2), and in the present case, the degree of idiotcy was very great. In the second case it was much slighter. And in that case the question reserved was, whether the judge ought to have left the case to the jury, there being no evidence against the prisoner except the fact of connection and the imbecile state of the girl. And what the judges held was, that in that case there ought to have been some further evidence. I do not think they at all meant to overrule the earlier case, but only to say that in the particular case before them they did not think there was evidence to go to the jury. In the present case the evidence was much stronger.

LUSH, J. I am of the same opinion. I do not think, in the second case of *Reg.* v. *Fletcher* (1), it was intended to overrule the earlier cases, but to distinguish them. If there were a real conflict of decision it might be right for us to reserve this case for the decision of a larger number of judges, but I do not think there is.

POLLOCK, B., and HONYMAN, J., concurred.

Conviction affirmed.

Attorneys for prosecution: *Clarke & Son.*

(1) Law Rep. 1 C. C. 39. (2) Bell C. C. 63; 28 L. J. (M. C.) 172.

THE QUEEN *v.* WEAVER. 1873
Nov. 22.

Evidence—Registration of Birth—Certified Copy.

An extract from a register of births purporting to be signed and certified by a deputy superintendent registrar, as the person in whose custody the register book is, is admissible in evidence on its mere production.

CASE stated by the deputy chairman of the Glamorganshire Quarter Sessions.

Handy Weaver was tried at the last Midsummer quarter sessions for the county of Glamorgan, on an indictment for unlawfully and carnally knowing and abusing a girl, being above the age of ten years and under the age of twelve years. The prisoner was convicted upon sufficient evidence in other respects, but it was objected by the counsel for the prisoner that the proof of age was not sufficient, and, having some doubt, the deputy chairman respited the execution of the sentence in order to obtain the opinion of the judges.

A copy of an entry in the register book of births in the registrar's district of Merthyr Tydvil Lower, certified to be a true copy by the deputy superintendent registrar, with a further certificate that the said register book was then lawfully in his custody, was tendered by the counsel for the prosecution and received in evidence. The entry proved that a child named therein, Jane Watkins, was at the date of the offence alleged in the indictment of the age of eleven years and eight months. This certified copy was tendered by the counsel for the prosecution without verifying or producing it in the proper way, no witness being in attendance to do so.

Elizabeth Abraham, the grandmother of the child who was the subject of the indictment, was called, and spoke the Welsh language only. The deputy chairman directed the sworn interpreter to translate every word of the certified copy into Welsh in the hearing of the witness. She then said—"I believe on my oath that the child now present, and known as Jane Watkins, is the child named in the certificate now read." She also proved that the said child was the illegitimate child of Ann Abraham, daughter of the witness (now in Australia), and of Benjamin Watkins; that

1873

THE QUEEN v. WEAVER.

her daughter Ann Abraham now passed as Ann Watkins; that she (the witness) was present at the birth, but not at the registration of the birth of her daughter's child, and that the said child was baptized in the name of Jane Watkins, though her mother was unmarried and was Ann Abraham, and that she did not know the precise age of the child of her own knowledge, but knew it only by means of the said entry.

The learned deputy chairman told the jury that he thought there was some evidence that the girl Jane Watkins named in the indictment was the Jane Watkins named in the register, and if they were satisfied as to that point, then that the girl was within the statutable age, and they must proceed to find whether the prisoner had committed the offence set forth in the indictment.

The jury brought in a verdict of guilty.

The point reserved on which the opinion of the Court of Appeal was requested was, whether the reception of the certified copy of the register as tendered by the counsel for the prosecution without calling a witness to produce it, was right and, coupled with the evidence of the child's grandmother, was sufficient to support the finding of the jury.

The certificate itself was annexed (see next page).

Nov. 15. No counsel appeared.

Cur. adv. vult.

Nov. 22. KELLY, C.B. Only two questions are raised in this case. The first is whether there was any evidence of the identity of the prosecutrix with the child to whom the certificate of registration purported to refer; and there can be no doubt that there was sufficient evidence.

The second question is, whether the document which purported to be a certified extract from a register of births was admissible in evidence on its mere production by counsel. This depends upon two things. First, under the Registration Acts there can be no doubt that the registers of births are public documents, admissible in evidence on their mere production. And then, by 14 & 15 Vict. c. 99, s. 14, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its

(Page 93.)

1861.—Births in the District of Merthyr Tydfil Lower, in the County of Glamorgan.

No.	When and where born.	Name, if any.	Sex.	Name and Surname of Father.	Name and Maiden Surname of Mother.	Rank or Profession of Father.	Signature, Description, and Residence of Informant.	When Registered.	Signature of Registrar.	Baptismal Name, if added after Registration of Birth.
463	Twenty-seventh of September, 1861. 65, Ynysgan Street, Merthyr.	Jane.	Girl.	Benjamin Watkins.	Ann Watkins, formerly Abram.	Iron Miner.	+ The mark of Ann Watkins, mother, 65, Ynysgan Street, Merthyr.	Fifth November, 1861.	Herbert James, Registrar.	

I certify that the above is a true copy of an entry in the Register Book of Births in the Registrar's District of Merthyr Tydfil Lower, in the Superintendent Registrar's District of Merthyr Tydfil, in the counties of Glam and Brecon. And I further certify that the said Register Book is now lawfully in my custody.

Witness my hand this 1st day of July, 1873.

Stamp.

1 July, 1873. Superintendent H. L. D. S. R.

H. Lewis, Deputy Superintendent Registrar.

Book No. 45.

By the 14 & 15 Vict. c. 99, s. 14, a copy of any book which is of such a public nature as to be admissible in evidence on its mere production from the proper custody, is made admissible in evidence in any Court of Justice, provided it purport to be signed and certified as a true copy by the officer to whose custody the original is intrusted.

1873

THE QUEEN v. WEAVER.

contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted." The document in question comes precisely within the terms of this section.

BLACKBURN, LUSH, and HONYMAN, JJ., and POLLOCK, B., concurred.

Conviction affirmed.

Nov. 15.

THE QUEEN *v.* KITCHENER.

Locomotive on Road—Damage to Bridge—County Bridge—24 & 25 Vict. c. 70, ss. 6, 7, 13.

By 24 & 25 Vict. c. 70, s. 7: "Where any turnpike or other roads upon which locomotives are used pass over any stream, or watercourse, navigable river, canal or railway by means of any bridge, and such bridge shall be damaged by reason of any locomotive passing over the same or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in or having the charge of such navigable river, canal, or railway, or the tolls thereof, or of such bridge, shall be liable to repair any damage so to be occasioned; but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons as aforesaid respectively interested in or having the charge of such river, canal, or railway, or the tolls thereof, or of such bridge, by and at the expense of the owner or the person having the charge of such locomotive":—

Held, that this section does not apply to a county bridge.

CASE stated by Cleasby, B.

This case was tried at the Bedford Summer Assizes.

The defendant was indicted for the non-repair of a highway which had become impassable by reason of the breaking in of the bridge over which it passed, and which, it was alleged, the defendant was bound to make good by virtue of s. 7 of the 24 & 25 Vict. c. 70 (1).

(1) By 24 & 25 Vict. c. 70, s. 6: "It shall not be lawful for the owner or driver of any locomotive to drive it over any suspension bridge, nor over

The indictment alleged that the highway was a highway for passengers, and carriages, and locomotives, and was carried over a watercourse by means of a bridge, and that the bridge and the

---

any bridge on which a conspicuous notice has been placed by the authority of the surveyor or persons liable to the repair of the bridge that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridgemaster under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge; and in case such owner of the locomotive and surveyor of the road or bridge or bridgemaster shall differ in opinion as to the sufficieny of any bridge to sustain the transit of the locomotive, then the question shall be determined by an officer to be appointed, on the application of either party, by one of Her Majesty's principal secretaries of state, whose certificate of sufficiency of such bridge shall entitle the owner of the locomotive to take the same over such bridge."

Sect. 7. "Where any turnpike or other roads upon which locomotives are or hereafter may be used, pass, or are, or shall be, carried over or across any stream or watercourse, navigable river, canal or railway, by means of any bridge or arch (whether stationary or moveable), and such bridge or arch, or any of the walls, buttresses, or supports thereof shall be damaged by reason of any locomotive, or any waggon or carriage, drawn or propelled by or together with a locomotive, passing over the same or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other person interested in or having the charge of such [navigable river, canal or railway, or the tolls thereof, or of such bridge or arch, shall be liable to repair, or make good any damage so to be occasioned, or to make compensation to any person for any obstruction, interruption or delay which may arise therefrom to the use of such bridge, arch, navigable river, canal, or railway, but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons as aforesaid, respectively interested in or having the charge of such river, canal or railway, or the tolls thereof, or of such bridge or arch by and at the expense of the owner or owners, or the person or persons having the charge of such locomotive at the time of the happening of such damage; and all such owner and owners, person and persons, having the charge of such locomotive as aforesaid shall also be liable, both jointly and severally to reimburse and make good as well to the proprietor, undertaker, directors, conservators, trustees, commissioners, and other persons interested in, or having the charge of, any such navigable river, canal or railway, or the tolls thereof, or of such bridge or arch, as to all persons navigating on or using, or who but for such obstruction, interruption, or delay, would have navigated on or used the same, all losses and expenses which they or any of them may sustain or incur by reason of any such obstruction, interruption or delay, such losses and expenses to be recoverable by action at law, which action, in case of such proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons so interested

1873

THE QUEEN v. KITCHENER.

walls and supports thereof were broken in by reason of a locomotive of the defendant passing over and coming in contact with the same, and that the defendant, though requested to do so, and though a reasonable time had elapsed, had not repaired the damage done to the bridge, and so the highway could not be used by the public with safety.

It was proved or admitted at the trial that there was a highway for passengers, carts, and carriages leading from Biggleswade to Broom, in the county of Bedford, and that it passed over a stream or watercourse called "Rook's Hole" by means of a bridge which was sufficiently strong for ordinary traffic.

2. That the defendant was the owner of a locomotive traction engine weighing about ten tons, and that on the 11th of February the engine, in passing over the bridge, broke in the part over which it passed, and fell through into the water; and that in consequence the highway became unsafe for ordinary traffic.

3. That the bridge was formed of iron girders fastened in brickwork on each side, and was repairable by the county.

4. That one of the outside girders was cracked and defective, and that the attention of the county surveyor had been called to this two years ago, but nothing was done to repair it because the bridge was safe for ordinary traffic, and the defective girder was an outside one, and that traffic was not immediately over it, and the surveyor did not know that the road was used by traction engines.

5. That the bridge was broken in at the middle, and it did not appear that the breaking in was attributable to the defective girder.

6. That no notice had been put up to prevent the road being used by locomotives, and that the locomotive of the defendant complied with the requirements of the statute 28 & 29 Vict. c. 83.

---

as aforesaid, may be brought in the name or names of their agent or agents, clerk or clerks for the time being, or by any person or persons legally authorized to act in their behalf."

Sect. 13. "Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance, and every such person so using such engine shall notwithstanding this Act be liable to an indictment or action, as the case may be, for such use where, but for the passing of this Act, such indictment or action could be maintained."

7. That the defendant had been requested to repair the bridge and road, and that a sufficient time for doing so had elapsed.

It was contended on behalf of the defendant that he could not be convicted.

First. Because the facts do not shew an indictable offence.

Secondly. Because no notice had been given under the statute to prevent the road being used by locomotives.

Thirdly. Because no injury was done to the bridge by the locomotive striking against the piers or any other part of it, or any damage by the mode of propelling it.

Fourthly. Because, as the locomotive was lawfully using the road and the bridge broken in from its weakness to support it, the bridge could not properly be said to be damaged by the use of the locomotive, but by reason of its own unfitness.

The learned judge overruled all the objections, and directed the jury that if the road and bridge were in a fit state for ordinary traffic a person using a locomotive upon it did so at his peril, and if the bridge was broken in from being unable to bear the weight of the locomotive passing over it, the defendant was responsible.

The jury found the prisoner guilty, and he was let out on bail and the judgment respited.

If the learned judge's direction was wrong the conviction was to be quashed, if otherwise, to stand.

Merewether, for the prisoner. The bridge in this case is a county bridge; and s. 7 of 24 & 25 Vict. c. 70, under which the indictment is framed, has no application to such a bridge. The whole of that section must be read together; and it refers only to proprietary bridges—bridges vested in the particular classes of persons mentioned in the latter part of the section, or "other persons interested" of a similar kind. This cannot include the inhabitants of the county. County bridges are protected by s. 6, by means of the notice which that section authorizes. In that section the surveyor is particularly mentioned, while in s. 7 he is not. He also cited 43 Geo. c. 59, s. 4, and 28 & 29 Vict. c. 83, s. 9.

Graham (*Byles* with him), for the prosecution. The preamble of the Act which refers to "turnpike and other roads," shews

1873

THE QUEEN v. KITCHENER.

that it was intended to have the widest application, and s. 7 begins with the same words, and its terms are wide enough to cover such a bridge as this. The county surveyor is a person "interested in or having the charge of" the bridge. And the county is included under the same words. He cited *Rex* v. *Egerly* (1), Com. Dig., tit. Chemin, 83; 1 Burns' Justice, p. 576.

Merewether, was not called upon to reply.

KELLY, C.B. This conviction cannot be sustained. The bridge in question is not a bridge within the meaning of s. 7, and the inhabitants of the county are not "persons interested" in the sense intended by that section. This is a county bridge; and county bridges are provided for by ss. 6 and 13, which, together with the law previously in force, sufficiently meet any danger which might arise from the use of locomotives on such bridges. By s. 6, locomotives are forbidden to pass over suspension bridges at all, and over any other bridge "on which a conspicuous notice has been placed, by the authority of the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridge-master, under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge." And s. 13 reserves all powers of indictment and rights of action where the use of the locomotive is such as to amount to a nuisance. In the present case the bridge was not a suspension bridge; no notice under s. 6 was given, and there is no question of nuisance.

The case then depends entirely upon s. 7. And the operation of that section seems to me to be limited to bridges of a particular description, that is to say, bridges which themselves are, or pass over canals or the like which are, vested in what I may call private persons, who would be prejudiced by damage to the bridge. It is not intended for the protection of persons entitled to the use of it, and who can suffer no other damage by its non-repair than the inability to use it. What the section says is, that when a locomotive injures a bridge, "none of the proprietors, undertakers, directors, conservators, trustees, or other persons interested in or having

(1) 3 Salk. 183.

the charge of such navigable river or of such bridge, shall be liable to repair any damage so occasioned, but every such damage shall be repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons as aforesaid, respectively interested in, or having the charge of," such river or bridge, by the owners of the locomotive. Surely, if this were intended to apply to county bridges, county would have been mentioned first of all. But as it is, the section is clearly limited to bridges which are the property of, or which pass over canals and the like which are the property of, persons similar to those enumerated, the rights of the public being protected by ss. 6 and 13.

BLACKBURN, J. I am of the same opinion. At common law, highways are repairable by the parish or hundred, including bridges over small streams; while those over large streams are repairable by the county. Cases may arise where, under Acts of Parliament authorizing the making of bridges, the makers may be liable for their repair, as in the case of the Bedford Level: *Reg.* v. *Ely* (1), but the hundred is not thereby relieved. So it is with turnpike roads: the trustees are liable; but so is the parish. So in many cases a railway company may be liable, and some one else likewise. Then s. 7 says that when a bridge is injured by a locomotive, "none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in, or having the charge of," the river or the bridge, shall be bound to make good the damage done. Now what class of persons does that refer to? I think to such persons as the trustees I have spoken of. It says that they shall be relieved from liability to repair. But it cannot be meant to relieve the parish or county so that the bridge shall remain in ruins to the detriment of the public. If any such thing were meant, the Act would have said, "those who would otherwise be bound to repair shall not be liable." But all that is meant, I think, is that where there is a body of persons liable to repair in ease of the general public, they shall be relieved. If the Act had simply said that the owners of locomotives should make good all damages without qualification, that might have been sufficient to support this in-

(1) 15. Q. B. 827; 19 L. J. (M.C.) 223.

1873

THE QUEEN v. KITCHENER.

dictment. But they are only to do so "to the satisfaction" of the particular classes of persons I have referred to.

If there be any remedy, therefore, it is by action, or by proceedings under 43 Geo. 3, c. 59, or by mandamus, not by indictment under s. 7 of the Act now in question.

LUSH and HONYMAN, JJ., and POLLOCK, B., concurred.

Conviction quashed.

Attorneys for prosecution: *Young, Maples, & Co., for T. W. Pearse, Bedford.*

Attorney for prisoner: *G. H. K. Fisher.*

Nov. 15.

THE QUEEN *v.* CHRISTIAN.

Agent—Misappropriation of Money—Direction in Writing—24 & 25 Vict. c. 96, s. 75.

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for 300*l.*, J. bonds, at 112, 336*l.*;" and the contract note ran, "Sold to Mrs. S. (the prosecutrix) 300*l.* J. at 112, 336*l.*" and was signed by the prisoner. The prosecutrix wrote in reply: "I have just received your note and contract note for three J. shares, and inclose a cheque for 336*l.* in payment." The prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque:—

Held, that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 & 25 Vict. c. 96, s. 75; and that the prisoner was rightly convicted of a misdemeanour under that section.

CASE stated by Honyman, J.

The prisoner was tried at the October sessions of the Central Criminal Court, 1873, for converting to his own use or benefit the proceeds of a cheque for 336*l.*, with which he had been intrusted as the agent of one Mary Ann Spooner, contrary to the statute 24 & 25 Vict. c. 96, s. 75. (1)

(1) By 24 & 25 Vict. c. 96, s. 75: "Whosoever having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of

The prisoner was a stock and share dealer, carrying on business at 11, Royal Exchange. In the year 1872 a Mrs. Spooner, a widow, was introduced to the prisoner, and the prisoner offered to make any investments for her that she might wish, and told her that out of respect for her late husband he would not make her any charge for so doing. Between this time and the 1st November, 1872, the prisoner purchased for her at different times a variety of securities, amounting in the whole to 1326*l.* 17*s.* 6*d.*, for doing which he made no charge; and, on the other hand, Mrs. Spooner from time to time made payments to the prisoner, amounting in the whole to 1886*l.* 2*s.* 6*d.*, such payments not being made specifically against any particular item, but in cheques for round sums.

On the 12th November, 1872, the prisoner made the following suggestion to Mrs. Spooner:—

"11, Royal Exchange, London, E.C.
"November 12th, 1872.

"Amended Scheme of Investment.

"Argentine, 6 per cent.	Price (say),	97	(2 bonds)		194*l.*
"Austrian Silver Rentes, 5 per cent.	„	67	2	„	134*l.*
"Chilian, 6 per cent.	„	103	2	„	206*l.*
"Chilian, 7 per cent.	„	108	1	„	108*l.*
"Japanese, 9 per cent.	„	111	2	„	222*l.*
"United States, 5/20, 6 per cent.	„	93	5	„	465*l.*
					1,329*l.*

"Producing 89*l.* per annum.

"Dear Madam,—The above is an amended scheme of investment, which I trust you will find in accordance with your wishes.

"No doubt it will be better to take advantage of present lower quotations, wherever prices have been affected by late events, and

---

the proceeds, of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, ... shall be guilty of a misdemeanour. ...."

1873

THE QUEEN v. CHRISTIAN.

I will proceed to act immediately on receiving your instructions to that effect.

"I remain, dear madam, yours truly,

"Mrs. Spooner, &c., &c., &c." "Y. Christian.

Mrs. Spooner assented to this, and on the 14th November, 1872, the prisoner purchased on her account, but in his own name, from one Wrenn, a jobber on the Stock Exchange, the three sets of securities mentioned in the contract note of the 14th November, 1872, hereinafter set out, and sent to Mrs. Spooner the following letter and contract note.

"11, Royal Exchange, London, E.C.,
"November 14th, 1872.

"Dear Madam,—I have much pleasure in inclosing contract note for

"200*l.* Argentine 68 @ 96
"200*l.* Austrian Sil. @ 65½
"2500$, 5/20, 1867 @ 93½

which I have every reason to believe will pay you very well, taking into consideration their stability. I hope to get the Japanese to-morrow. Railways—Great Northern, Great Western, and Caledonian—are all expected to give good dividends, and I think you will do well to procure a few. The markets are on the rise in consequence of the bank rate not having been altered.

"I beg to remain, dear madam, yours most obediently,

"Mrs. Spooner." (Signed) "Y. Christian.

"London, November 14th, 1872.

"Sold to Mrs. Spooner,		£	s.	d.
"200*l.* Argentine, 1868	@ 96 net	192	0	0
"200*l.* Austrian Silver	@ 65½ „	131	0	0
"2500 dol., 5/20, 1867	@ 93½ „	525	18	9
		848	18	9

"Stock and Share Dealer,
"11, Royal Exchange, E.C. "Y. Christian.
"Bankers—Bank of England."

Rect. Stp.

The prices mentioned in this note were the same as those agreed between the prisoner and the vendor of the bonds, &c. The prisoner did not disclose his principal, but said he was buying for a widow lady.

On the 15th November, 1872, Mrs. Spooner sent to the prisoner the following statement of account between herself and the prisoner:—

STATEMENT OF ACCOUNT.

		£		£	s.	d.	£	s.	d.
Feb.	3	200	New South Wales Govt. Stk. @ 104⅝	209	5	0			
„		200	Victoria 6% Gov. Stk. @ 114⅜	228	15	0			
April	10	25	Western Gas (A. B. or C.) @ 17¾	443	15	0			
„		7	Imperial Gas (12½*l.* issue) 10*l.* pd. @ 4 pm. . . .	98	0	0			
„		8	Reuter's Tel. @ 11¼, Stamp Fee	90	10	0			
„	17	13	Imperial Gas (12½*l.* issue) 10*l.* pd. @ 4 pm. . . .	182	0	0			
„			Stamp and Fee . . .	1	2	6			
„			„ „ 7 Imp. Gas. Ap. 10th.	0	12	6			
„			„ „ 25 Western Gas, Ap. 10th. . . .	2	7	6			
„	22	5	Imperial Gas @ 14 . .	70	0	0			
			Stamp and Fee . . .	0	10	0			
Nov.	14	200	Argentine, 1868, @ 96 . .	192	0	0			
„		200	Austrian Silver @ 65½ . .	131	0	0			
„		$2500	5/20, 1867, @ 93½ . .	525	18	9			
				2175	16	3			
Feb.	3		By cheque				500	0	0
April	10		do.				600	0	0
April	11		do.				100	0	0
April	18		do.				186	0	0
April	23		do.				500	0	0
							1886	2	6
			Balance . .				282	13	9
							2175	16	3

accompanied by the following letter:—

"2, Pemberton Terrace, St. John's Park,
"Nov. 15th, 1872.

"My dear Sir,—I inclose a statement of account with a cheque

1873

THE QUEEN v. CHRISTIAN.

for the balance, which I hope you will find correct. When I know the amount of the Japanese, I will immediately forward you a cheque for the same. With my best thanks for all your kindness,

"I am, yours faithfully,

"Y. Christian, Esq." (Signed) "M. A. Spooner.

and also by a cheque for 289*l.* 13*s.* 9*d.*, payable to the prisoner or order, and the prisoner, on the 16th November, acknowledged the receipt of the cheque and account, and obtained payment of the former.

On the 27th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner:—

Y. Christian,
Stock and Share Dealer.
Bankers,—
Bank of England.

"11, Royal Exchange,
"London, E.C.
"November 27th, 1872.

"Dear Madam,—I inclose a contract note for 300*l.* Japanese Bonds, at 112—336*l.*

"This 300*l.* was offered to me in one lot, and I thought myself fortunate in securing them for you, and had no doubt of your ratifying what I have done. These Japanese securities are really a first-rate investment; and will pay 8 per cent. I have got them at the lowest price of the day, and indeed, my apparent dilatoriness in the matter has been caused solely by my anxiety to get them cheaper, if I could.

"Yours truly,

"Mrs. Spooner, &c. &c." (Signed) "Y. Christian.

and inclosed it in the following contract note:—

"London, 27th Nov., 1872.

"Sold to Mrs. M. A. Spooner,	£	*s.*	*d.*
300*l.* Japanese @ 112	336	0	0

"Stock and Share Dealer,
"11, Royal Exchange, E.C.
"Bankers—Bank of England."

"Y. Christian. Rect. Stp.

The prisoner had on the same day bought in his own name, from Mr. Wrenn, three Japanese bonds at 112.

It was not true that the 300*l.* was offered to the prisoner in one lot; but the prisoner asked Mr. Wrenn for three bonds.

On the same day Mrs. Spooner sent to the prisoner the following letter:—

"2, Pemberton Terrace, St. John's Park,
"Nov. 27, 1872.

"My dear Sir,—I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l.* in payment.

"I am much obliged to you, and perfectly satisfied that you have purchased the three shares for me.

"My son, Frank, will be the bearer of this, and I shall feel obliged if you will kindly give him any information you can about the 'Nicholas Railway,' and the 'Share Investment Trust.'

"Again thanking you in haste,

"Believe me, yours faithfully,
(Signed) "M. A. Spooner."

and also a cheque for 336*l.*, payable to the prisoner or order, and the prisoner received and indorsed the cheque, and received the proceeds thereof.

On the 29th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner:—

Y. Christian,
Stock and Share Dealer.
Bankers,—
Bank of England.

"11, Royal Exchange,
"London, E.C.
"November 29th, 1872.

"Dear Madam,—I have to acknowledge the receipt of your cheque for 336*l.*, value for three Japanese bonds, which I shall have the pleasure to forward you immediately on their being delivered. I now inclose two 100*l.* Argentine bonds, of the Six per Cent. Loan of 1868, Nos. B 12,309, and 1572; and two bonds for 1000 florins each, of the Austrian Currency Loan, Nos. 495,402 and 495,403.

"With reference to the latter portion of your note, I will at once say, I do not recommend either the Nicholas Railway, or the

1873

THE QUEEN v. CHRISTIAN.

Share Investment Trust. But turning the matter over, I consider for safety and profit, a sum laid out on Great Western or North London Railway Shares will do good. For that purpose, however, we must watch the market, and take advantage of a day or week when prices have declined. But of course I shall do nothing till I have your sanction for proceeding.

"Yours truly,

"Mrs. Spooner, &c. &c. &c." (Signed) "Y. Christian.

Mrs. Spooner never received either the 2500 United States bonds, or the Japanese, though she repeatedly applied to the prisoner for them; and the prisoner, on one occasion, told her that the broker or jobber was in his debt, and that the broker or jobber knew that when he delivered the bonds, the prisoner would deduct from the price the amount of such debt. On the 8th August, 1873, the prisoner offered Mrs. Spooner a composition, and informed her he was filing a petition for liquidation. Ultimately, the United States bonds and the Japanese bonds, having been carried over from time to time, by order of the prisoner, without the knowledge of Mrs. Spooner, were sold by the orders of the prisoner.

The prisoner never paid the person from whom he bought the United States and Japanese bonds for the same, and the cheques for 289*l.* 13*s.* 9*d.* and 336*l.* were paid into the prisoner's account, and the proceeds of such cheques applied by the prisoner to his own purposes.

At the close of the case for the prosecution, it was submitted on behalf of the prisoner, that Mrs. Spooner's letter of the 27th November, 1872, did not constitute a sufficient direction in writing to apply, pay, or deliver the cheque or its proceeds for any purpose or to any person specified in such direction within the meaning of the statute.

The learned judge left the case to the jury, but reserved the aforesaid question for the opinion of the Court of Criminal Appeal.

The jury found the prisoner guilty.

The question for the opinion of the Court of Criminal Appeal was, whether Mrs. Spooner's letter of the 27th November, 1872, coupled with the prisoner's letter of that date, and the contract

note for the Japanese bonds, was, under all the circumstances of the case, a sufficient direction in writing within the statute.

Metcalfe, Q.C. (*Collins* with him), for the prisoner. The section under which the prisoner was indicted was passed originally to meet the case of *Rex* v. *Walsh*. (1) And it applies only to a case in which there is a direction to apply the security itself, or the specific moneys received as its proceeds, in a particular way. But here the course of dealing between the parties shews that the prisoner was at liberty to pay any cheque received from the prosecutrix into his own bankers. The cheque was in fact sent to him to indemnify him for any payment he had made, or had rendered himself liable to make, for the prosecutrix. This is the natural meaning of the words "in payment." He also cited *Reg.* v. *Golde*. (2)

Meade, for the prosecution was not called upon.

KELLY, C.B. By the terms of the statute, "whosoever having been intrusted, as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, or the proceeds, or any part of the proceeds of such security for any purpose, or to any person specified in such direction, shall in violation of good faith, and contrary to the terms of such direction, convert to his own use such money, security, or proceeds, or any part thereof," is guilty of a misdemeanour. And the only question in the present case is, whether the instructions contained in the prosecutrix's letter of the 27th November were a "direction" within the meaning of the Act, and if so, what the meaning of the direction was. In my opinion, that letter, when fairly construed, does amount to a direction, and such a direction that the prisoner may rightly be said to have converted the proceeds of the cheque to his own use, contrary to its terms.

The prisoner had been in the habit of purchasing securities for the prosecutrix, and receiving cheques from her in respect of them.

(1) R. & R. Cr. C. 215 (2) 2 Mood. & Rob. 425.

1873

THE QUEEN v. CHRISTIAN.

It does not very clearly appear whether in all instances he purchased in his own name, nor is it very material. Then, in his letter to her of the 27th November, he says: "I inclose a contract note for 300*l.* Japanese bonds, at 112, 336*l.*" And the contract note inclosed was in this form: "Sold to Mrs. W. A. Spooner 300*l.* Japanese at 112, 336*l.*," and was signed by the prisoner. This contract note and the letter in which it was inclosed are both ambiguous. They might mean that the prisoner had bought the bonds and had got them, so that there was nothing to do but to hand them over to the prosecutrix on payment by her of the price; and in this case her letter in reply, "I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l.* in payment. I am perfectly satisfied that you have purchased the three shares for me," might well mean, "Whereas you have bought and paid for the bonds, you will receive this cheque in payment to yourself." But the prisoner's letter might also mean that he had bought the bonds in his own name, but that they were not yet handed over because not paid for; so that it was necessary to get money to pay for them. And if this had been explicitly stated, then the prosecutrix's letter in reply would have meant, "I send you a cheque which you will either hand over to the seller of the bonds, or obtain payment of it, and hand the proceeds or your own cheque in lieu of them to the seller." And upon this view the offence charged would clearly have been committed.

If, then, either construction of the letter is fairly possible, must we not read it in the alternative, as saying, "You do not state whether you have paid for the bonds; if you have done so, keep the cheque, if not, then apply the money in payment to the seller, so that you may get the bonds and hand them over to me?" And so reading the letter, and applying it to the state of facts that really existed and were known to the prisoner, it became a direction to apply the cheque or its proceeds in payment for the bonds. And the prisoner was therefore rightly convicted.

BLACKBURN, J. I am of the same opinion. Before turning to the words of the statute, look at the facts. The prisoner being an

agent within the meaning of the statute (for as to that no question is reserved), consents to act on the terms contained in his first letter of the 12th November. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is at any rate no doubt that the prisoner must have made himself personally liable to them. And therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand, so as to keep him out of advances. In this state of things he writes his letter of the 27th November, and the prosecutrix her answer of the same date. Now, looking at the facts, and writing down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be. "Inasmuch as there is a sum of 336*l.* which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds." I think if the prisoner had handed over the cheque itself, or handed over the actual notes received for it, he would have been within his instructions. I think he would have been so also if he had paid it into his own bank bonâ fide for the purpose of meeting a cheque of his own given to the seller, although a hundred things might intervene to prevent the cheque being actually met. I think, then, that the prosecutrix's letter was a direction to apply the cheque or its proceeds to getting the bonds for her, free from any lien or claim on the part of the seller.

Turning, then, to the statute, and applying its words to the facts of the case, we find that the prisoner was an agent and he received a direction in writing to apply the cheque or its proceeds to a certain purpose. And the jury have found that in violation of good faith, and contrary to that direction, he applied them to his own use. I have no doubt, therefore, that he was rightly convicted.

LUSH, J. The only question reserved is, whether Mrs. Spooner's letter of the 27th November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese bonds,

1873

THE QUEEN v. CHRISTIAN.

was, under all the circumstances of the case, a sufficient direction in writing within the statute. And looking at the course of dealing between the parties, I think the natural meaning of the prosecutrix's letter is, "If you have not paid for the bonds, use the cheque or its proceeds to pay," and therefore the prisoner was rightly convicted.

POLLOCK, B., and HONYMAN, J., concurred.

Conviction affirmed.

Attorneys for prosecution: *Wilkinson & Son.*
Attorney for prisoner: *R. King.*

END OF MICHAELMAS TERM, 1873.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXVII VICTORIA.

REG. *v.* THOMAS CREESE.

1874
Jan. 31.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *subs.* 5—*Fraudulent Removal —Property of Debtor.*

On the 21st December, 1872, the prisoner executed an assignment of the property upon his farm to trustees for the benefit of certain of his creditors. The assignment was not registered as a bill of sale, and the prisoner continued in occupation of the farm, and in possession of the property assigned, under an agreement with the trustees by which he was to hold possession as their bailiff. On the 14th, 16th, and 17th October, 1873, the prisoner fraudulently removed stock from the farm of more than 10*l.* in value, forming part of the property assigned. On the 17th October, 1873, the prisoner commenced proceedings for liquidation by arrangement, and on the 7th November, 1873, the prisoner's creditors duly resolved that his affairs should be liquidated by arrangement, and a trustee was appointed. The prisoner was indicted under sect. 11, subs. 5, of the Debtors Act, 1869, for having within four months next before the commencement of the liquidation, fraudulently removed part of his property of the value of 10*l.* and upwards :—

Held, that though the assignment, not having been registered as a bill of sale, was void as against the trustee in liquidation, still, inasmuch as, at the time of the fraudulent removal, the assignment was in force and the property in the stock removed in the trustees under the assignment, he could not properly be convicted.

CASE stated by the Chairman of the Worcestershire Quarter Sessions :—

On the 7th January, 1874, the prisoner Thomas Creese, was tried at the Worcestershire Quarter Sessions on a charge of misdemeanor, under s. 11 of the Debtors Act, 1869, for having within four months next before the commencement of the liquida-

1874

REG. v. CREESE.

tion of his affairs, in pursuance of the Bankruptcy Act, 1869, fradulently removed part of the property of the value of 10*l.* and upwards.

The prisoner was at the date of the assignment hereinafter mentioned, and for some years previously, the occupier of a farm of considerable extent, called Fakener's Farm, as tenant to Earl Beauchamp, from year to year. In the month of May, 1872, the prisoner was in difficulties, and made a disclosure of his affairs to Mr. Henry Lakin, the land agent of Earl Beauchamp, and to a Mr. William White, both of whom were creditors of the prisoner for moneys previously advanced; and it appeared from such disclosure, that the prisoner was largely indebted, and to an amount exceeding the total value of his assets, and would be unable to continue the farm without assistance. Thereupon Mr. Lakin and Mr. White each made a further advance to the prisoner by way of temporary assistance, and Mr. Lakin entered into communication with Messrs. Berwick & Co., of the Old Bank, Worcester, who were the principal creditors, and ultimately an arrangement was come to which is evidenced by the two documents next hereinafter stated.

The first of these documents (hereinafter referred to as "the assignment") was an indenture dated the 21st December, 1872, and made between the prisoner of the one part and the said Henry Lakin and William White of the other part, and duly executed by all the parties, whereby, after reciting the tenancy of the prisoner of the said Fakener's Farm, and that he was then indebted to the said Henry Lakin and William White, and to the several other persons and firms whose names appeared in the first column of the schedule thereto, in the several sums respectively set opposite to such names in the second column of the said schedule, and being unable to pay such sums, had applied to Messrs. Lakin and White to assist him in making some disposition and arrangement of his affairs, with a view to such ultimate liquidation of his debts as might be satisfactory to his creditors; and that for this purpose it had been agreed that he should assign unto Messrs. Lakin and White his tenancy of the said farm and all other the property thereinafter mentioned upon the trusts thereinafter declared; and that, in order to enable the business of the said farm to be carried on as thereinafter mentioned, Mr. Lakin had agreed to

1874

REG. v. CREESE.

advance to the prisoner a further sum of 350*l.* for the purpose of meeting any then pressing demands and supplying other urgent occasions. It was witnessed that, in consideration of the sums of money then due to Messrs. Lakin and White, and of the further sum of 350*l.* then stated to be paid and advanced by Mr. Lakin, the prisoner thereby assigned all his estate, interest, tenant-right, and tenancy in the said Fakener's Farm, and all the live and dead farming stock, corn, grain, hay, and crops, implements of husbandry, and effects, chattels, and utensils, then in, upon, about, or belonging to the said farm, and all the household furniture and effects in and about the dwelling-house then in the occupation of the prisoner, upon the said farm, or elsewhere, and belonging to the prisoner, and all and every sums and sum of money owing to the prisoner in respect of the said business, unto Messrs. Lakin and White, upon trust to sell and convert the same into money at their discretion in manner therein mentioned, and in the meantime upon trust to be and continue tenants of the said farm, and carry on the business thereof, and receive and take the moneys to arise therefrom, and to stand possessed of the moneys to arise from such sale and conversion, and from carrying on the said business, upon trust, in the first place, to pay the rent, tithe, rates and taxes, premiums on fire insurance, and the costs incidental to the assignment, and the current wages and outgoings necessary for carrying on the business of the said farm (including any salary to be paid to the prisoner or any other person or persons for managing the said farm), and also the said sum of 350*l.* so advanced by Mr. Lakin, and costs and expenses of the trustees, as therein mentioned; and, in the next place, in or towards payment, at such times and by such dividends as the trustees or trustee for the time being of the said assignment might think fit, of the said several sums of money in which the prisoner was then indebted to Messrs. Lakin and White and his other creditors, as thereinbefore recited, together with interest upon any debts upon which it might be necessary or desirable that interest should be paid, in order to obtain time for payment of the principal (and particularly upon a bank debt to the said Messrs. Berwick & Co.), and should stand possessed of the surplus (if any) of such moneys upon trust for the prisoner, his executors, administrators, and assigns; and it was

1874

REG. v. CREESE.

thereby provided among other things that, in case of any difficulty arising as therein mentioned, the trustees should have power to wind up the said farming business and other matters coming into their hands, either by proceedings in bankruptcy, as in an ordinary bankrupt's estate, or by liquidation, or by any other such means as they might see fit, or think best, or might be advised, for the general good of the present creditors of the prisoner, without any let or hindrance from him. And it was also thereby agreed and declared that it was not contemplated that the said assignment should be registered under any Act of Parliament relating to the registration of bills of sale, and that Messrs. Lakin and White should not incur any liability by reason of the same not being registered.

In the schedule to the said indenture the names of sixteen creditors only appeared, whose debts amounted in all to 4210*l.* 9*s.* 10*d.* Among such creditors were the following:—

The said Messrs. Berwick & Co. .	for £2969	11	10
The said William White . .	„	473	17	2
The said Henry Lakin . . .	„	213	1	0
Earl Beauchamp, for rent and tithe .	„	271	19	6

The other twelve creditors in the schedule were for smaller amounts.

The assignment comprised substantially all the prisoner's property, and it has never been registered under the Bills of Sale Act. The provision in the assignment for not registering the same was inserted at the request of the prisoner, and for the purpose of saving his credit.

The second of the documents before referred to was an agreement dated the 23rd of December, 1872, and made between the said Messrs. Lakin and White of the one part and the prisoner of the other part, and signed by all the parties, whereby, in effect, the prisoner agreed to serve Messrs. Lakin and White in the capacity of bailiff or manager of the said farm from the 21st of December, 1872, until such service should be discontinued by a month's notice of either party; and whereby it was stipulated, among other things, that any purchases and sales which the prisoner might make on account of the said farm should be made only with the consent of Messrs. Lakin and White, and that the prisoner was, so long as the

1874

REG. v. CREESE.

service continued, to have a salary of 100*l.* per annum, and to occupy the house on the farm, except three rooms, which were reserved by Messrs. Lakin and White for occupation by any other person whom they might appoint.

Formal possession was given to Messrs. Lakin and White on the execution of the assignment, and thenceforth the prisoner continued to carry on the farm ostensibly as owner, but in reality as their bailiff and manager, and he did not, to the knowledge of Messrs. Lakin and White, until the time hereinafter mentioned, sell or purchase any stock on account of the farm without the previous consent of them, or one of them.

The said arrangement was communicated to Messrs. Berwick & Co. and to Earl Beauchamp, and assented to by them. It did not appear at the trial whether the same was or was not communicated or known to any other creditor of the bankrupt.

Before the completion of the said arrangement the prisoner handed to the trustees a list of debts, which he represented to be all that he then owed. That list comprised the debts mentioned in the schedule to the assignment, and also a number of other small debts, amounting in the aggregate to about 150*l.*, which it was intended to discharge at once out of the 350*l.* advanced by Mr. Lakin. The prisoner however knew at the time, and it was the fact, that he was then indebted to other persons not named in the list, and one, at least, of such undisclosed debts, viz. 300*l.* due to a Mr. Oliver Grub, on the prisoner's note of hand, is still unpaid.

All the debts mentioned in the said schedule to the assignment are also still unpaid, except four or five, the largest of which did not exceed 10*l.* There are other debts of the prisoner still unpaid, which were contracted between the dates of the assignment and the commencement of the liquidation.

The 350*l.*, advanced by Mr. Lakin at the date of the assignment, was intended by all parties to be applied and was applied as follows, viz.: 150*l.*, or thereabouts, in discharging the small debts in the list produced by the prisoner, and not included in the schedule to the assignment, and the remaining part thereof in carrying on the business of the farm for the benefit of the trust.

On the 17th October, 1873, the prisoner, while still carrying on the business of the said farm as the bailiff or manager of

1874

REG. v. CREESE.

the trustees under the said arrangement, instituted proceedings in the County Court of Worcester under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement, and on the 18th October, 1873, a receiver was appointed by the Court, who thereupon proceeded to take possession of the said farm and the stock and effects remaining thereon.

On the 7th November, 1873, at a meeting duly summoned of the prisoner's creditors, it was resolved by a statutory majority that the affairs of the said prisoner should be liquidated by arrangement, and one Francis Spooner was appointed and is now trustee under such liquidation. In the meanwhile, it was discovered that on the 14th, 16th, and 17th October, 1873, the prisoner had, without the consent or knowledge of Messrs. Lakin and White, or either of them, removed a large quantity of stock comprised in the assignment, of the value of several hundred pounds, from the said farm, and sold the same and applied the proceeds for the most part in payment of the debts of creditors not named in the schedule to the assignment.

It is not necessary to state in detail the circumstances of such removal, since it has been found by the jury, and is, for the purposes of this case, to be taken as a fact, that the removal was fraudulent.

It was, however, objected, on behalf of the prisoner, that the stock so removed was vested in Messrs. Lakin and White by virtue of the assignment, consequently was not and ought not to be considered as the prisoner's property within the meaning of s. 11 of the Debtors Act, 1869.

The learned chairman declined to withdraw the case from the jury on that objection, being of opinion that the assignment was void against the trustee under the liquidation, either under the Bills of Sale Act for want of registration, or under the Bankruptcy Act, 1869, as being an act of bankruptcy within twelve months of the commencement of the liquidation, and that having regard to the 15th section of the Bankruptcy Act, 1869, and the 3rd section of the Debtors Act, 1869, all property divisible among the prisoner's creditors under the liquidation must be considered as his property within the meaning of the last-mentioned Act; but he consented to reserve the point.

1874

REG. v. CREESE.

The jury returned a verdict of "guilty."

The question for the opinion of the Court was:—

Whether the stock comprised in the assignment of the 21st December, 1872, and so removed by the prisoner, as aforesaid, was the property of the prisoner within the meaning of s. 11 of the Debtors Act, 1869.

Jan. 24. *A. T. Godson*, for the prisoner. The conviction cannot be sustained, for the property in question was not, at the time of his alleged offence, the prisoner's property, but the property of the trustee under the deed of assignment. That assignment was not an act of bankruptcy, for there was a substantial new advance: *Ex parte Fisher* (1); *Mercer* v. *Peterson*. (2) And it was not affected by the Bills of Sale Act, for the assignment appears to have been for the benefit of all the creditors and therefore protected by the proviso. But even if the Bills of Sale Act applies, and the assignment thereby became void against the trustee in liquidation when the liquidation took place, still at the time of the misappropriation the property was in the trustees under the deed of assignment; and the doctrine of relation has no application to criminal matters. He cited also *Ex parte Todhunter*. (3)

Jelf, for the prosecution. The property was the property of the debtor within the meaning of the Debtors Act. Sect. 3 of that Act expressly enacts that its terms shall be construed in the same sense as in the Bankruptcy Act. And by the Bankruptcy Act, s. 15, the "property of the debtor" is that which is "divisible among his creditors." And this property clearly falls within that description in the section. For whether the assignment was an act of bankruptcy or merely within the provisions of the Bills of Sale Act, in either case it was absolutely void as against the trustee in liquidation. So that the property was the property of the debtor in the sense of being divisible among his creditors. He cited *Lomax* v. *Buxton* (4), *Ex parte Cohen* (5).

Godson replied.

Cur. adv. vult.

(1) Law Rep. 7 Ch. 636.
(2) Law Rep. 2 Ex. 304; Law Rep. 3 Ex. 105.
(3) Law Rep. 10 Eq. 425.
(4) Law Rep. 6 C. P. 107.
(5) Law Rep. 7 Ch. 20.

1874

REG. v. CREESE.

Jan. 31. The judgment of the Court (Lord Coleridge, C.J., Keating and Mellor, JJ., Pigott and Cleasby, BB.), was delivered by

CLEASBY, B. The defendant was indicted under the 5th subsection of s. 11 of the Debtors Act, 1869, for having, within four months of his petition for liquidation, fraudulently removed a part of his property. And the question was whether certain property removed by him on the 14th and 16th October (which was within the period specified, and as to which the jury found the removal was fraudulent) was his property within the meaning of that provision.

It appeared, that on the 21st December, 1872, the defendant had by indenture, for certain considerations, assigned his farm and all the property thereon to certain persons as trustees upon certain trusts there mentioned, and it is to be taken that the property removed was part of the property comprised in that deed. The property, no doubt, passed under the deed, but the deed was not registered, and it was therefore contended for the prosecution, that, by the Bills of Sale Act, the deed was void to all intents and purposes against assignees in bankruptcy; and, therefore, at the time of the removal the defendant was dealing with property upon which the deed did not (under the events which had happened) operate; and that it was therefore the defendant's property, and divisible among his creditors as such, so as to bring the same within the words and meaning of the section.

We are all of opinion that the indenture required registration, and so was inoperative against assignees in bankruptcy. It was contended that the deed was a deed for the benefit of creditors so as to come within the exemption in the Bills of Sale Act. It has been held in the case of *In re General Furnishing Company* v. *Venn* (1) that "creditors" in the Bills of Sale Act, means all the creditors; and therefore having regard to the trusts in the deed, viz., first, to pay the 350*l.* advanced by Lakin and White; secondly, to pay certain creditors named, being a selection of the defendant's creditors, and then in trust for the defendant, we are clearly of opinion that it does not come within the description of a deed

(1) 2 H. & C. 153; 32 L. J. (Ex.) 220.

1874

REG. v. CREESE.

for the benefit of his creditors, as interpreted by authority. It is a deed for the benefit of certain creditors, and of those unequally, and is besides a deed not founded upon the consideration of subsisting debts, but upon a new consideration and advance.

That being so, as soon as there was a petition for liquidation, the deed was void as against the trustee, and the property comprised in the deed became the property of the trustee. But it does not, in our opinion, follow from this that it was the property of the defendant on the 16th of October, or at any time between the assignment and the liquidation. The assignment is absolute, and irrevocably transfers the property. There is no imaginable state of things under which the property could return to the defendant. The resulting trust of the surplus, after paying all the debts specified, cannot be regarded as giving the defendant even contingently any interest in the goods themselves. In this case the trustee under the liquidation does not make title to the property through the defendant as being his at the time of the petition; but he claims the goods as having been the defendant's at the time of the assignment, and then the assignment by the Act of Parliament cannot be set up against him. Just as in the case of payments by way of fraudulent preference, the bankrupt voluntarily, and in contemplation of bankruptcy, pays a particular debt; he can never by possibility acquire any right to it; but his assignee in bankruptcy can recover it back, not because it became his, the bankrupt's, but because he ought not to have made the payment, and deprived the estate of the benefit of the amount.

If any person had seized or converted the goods after the assignment the defendant could never have maintained an action, and the assignee, in order to recover, must treat it not as a wrong done to the defendant, but as a wrong done to him as trustee.

The learned counsel for the prosecution appeared to feel that this conclusion was unavoidable, and he therefore mainly relied upon a construction of the subsection in question, which, if correct, might sustain the present indictment. He contended that the proper meaning of the words "his property" in the 5th subsection, was property divisible among his creditors, and that as the property in this case became divisible among his creditors the offence was proved. To this argument there are two answers.

1874

REG. v. CREESE.

First, at the time when the act was done it was not property divisible among his creditors, but became so by notice of a subsequent event which might or might not have happened; and you cannot, upon general principles (except by virtue of some clear and express enactment), alter the character of an act by something which occurs afterwards so as to make it criminal.

But it is not necessary to resort to this answer, because we think the argument of the learned counsel as to the construction of the subsection in question is not well founded. The argument was based upon a comparison of the words of the subsection in question with that of other subsections, and particularly upon that of the 15th subsection of the Bankruptcy Act, 1869. That subsection commences as follows: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt," so that in the Bankruptcy Act the words "property of the bankrupt," means his property divisible among his creditors. The section then specifies what property is not divisible and, therefore, does not come under the word property, viz. property held in trust, and tools of trade, wearing apparel, &c., of a certain value, and afterwards what property is divisible.

By s. 3 of the Debtors Act, 1869, words and expressions in that Act have the same meaning as in the Bankruptcy Act, so that in the Debtors Act the words "property of the bankrupt" mean "his property divisible among his creditors."

They must be so read in the 5th subsection, and the offence would consist in removing the property of the bankrupt divisible among his creditors, so as not to apply to trust property or tools in trade, &c. But we were asked upon the comparison above mentioned to read the words as not referring to the property of the bankrupt divisible, but to something which is not his property at the time, but afterwards becomes divisible by the operation of the bankruptcy law—a reading of the statute opposed, as we think, to true rules of construction, and violating the principle as to altering the quality of acts, innocent when done, so as to make them criminal by relation, to which we have already adverted.

It therefore appears to us that, in the present case, the defendant improperly removed the property of the trustees under the deed, and not his own property.

The date at which the act was done warrants the conclusion that it was done to evade the operation of the bankruptcy laws, which may be said of all cases of fraudulent preference; but another enactment is necessary in addition to the 16th subsection of s. 11, and the 3rd subsection of s. 13 to meet such a case as this.

We had a considerable argument, and many authorities were referred to, for the purpose of shewing that the assignment was an act of bankruptcy, so as to avoid the deed, and so give the assignees a title by relation back to that time. But as we have treated the deed as wholly void against the trustee in liquidation, by virtue of the Bills of Sale Act, it appears unnecessary to consider whether it is capable of being considered as an act of bankruptcy. It is fortunate that we deem this unnecessary, because after the cases of *Lomax* v. *Buxton* (1) and *Ex parte Fisher In re Ash* (2), being unable in criminal cases to draw inferences of fact, we have hardly materials before us to determine whether the deed was an act of bankruptcy or not.

It was suggested that at all events the defendant, as bailiff with possession, had a qualified property in the things removed, and that this was sufficient. But independent of other objections, the previous argument of the learned counsel had disposed of this argument, since it could not be contended that this qualified property was divisible among his creditors so as to come within the section.

For the reasons assigned, we think that the defendant, on the 14th and 16th October, did not remove his own property, and therefore the conviction must be quashed.

Conviction quashed.

Attorneys for prosecution: *Holden & Roberts, for R. Wood, Worcester.*

Attorney for prisoner: *J. M. Green, for E. Parry, Birmingham.*

(1) Law Rep. 6 C. P. 107. (2) Law Rep. 7 Ch. 636.

END OF HILARY TERM, 1874.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXVII VICTORIA.

1874
May 2.

THE QUEEN *v.* FARRELL.

Evidence—Illness of Witness—Deposition—11 & 12 *Vict. c.* 42, *s.* 17.

At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows:—The medical attendant of the witness was called and said: "I know M. L. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the Court going to her house and she herself coming to the court." The witness whose deposition it was proposed to read lived not far from the court:—

Held, that the deposition was not admissible.

CASE stated by Lord Coleridge, C.J.

The prisoner was indicted for embezzlement, and was tried at Stafford on Saturday, the 14th of March, 1874. In the course of the case for the prosecution, it was proposed to put in evidence the deposition of Mary Lee, the aunt of the prosecutor, who sold milk, but whose milk accounts were entirely kept and his milk business managed by Mary Lee, his aunt. To Mary Lee the prisoner had been in the habit of accounting. Mary Lee was alive, and was living in Stafford, not far from the court where the prisoner was being tried. Due proof having been given that her deposition was properly taken in the presence of the prisoner, and

1874

THE QUEEN v. FARRELL.

with full opportunity of cross-examination, it was proposed to read it under 11 & 12 Vict. c. 42, s. 17 (1), on the ground that she was so ill as to be unable to travel. On this point Samuel Cookson, a doctor of medicine, being in Stafford, and the regular medical attendant of Mary Lee, gave the following evidence:—"I am a doctor of medicine, living and practising in Stafford. I know Mary Lee. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the Court going to her house and she herself coming to the court."

The learned judge received the deposition in evidence, and the

(1) By 11 & 12 Vict. c. 42, s. 17: "In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case and shall put the same into writing, and such deposition shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation which such justice or justices shall have full power to do; and if upon the trial of the person so accused, as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

1874

THE QUEEN v. FARRELL.

jury convicted the prisoner; but reserved the question for the opinion of this Court whether the deposition ought to have been received. If it ought not the conviction was to be quashed.

April 25. No counsel appeared.

Cur. adv. vult.

May 2. The judgment of the Court (Lord Coleridge, C.J., Blackburn, J., Pigott, B., Lush, J., and Cleasby, B.), was delivered by

LORD COLERIDGE, C.J. This was a case reserved by me at the last assizes at Stafford. The prisoner was indicted for embezzlement, and the case depended entirely on the evidence of Mary Lee, who was the aunt of the prosecutor and managed his business. She had been properly examined and cross-examined in the presence of the prisoner when the prisoner was before the magistrate, and it was now proposed to put in her deposition. The medical man, who was her regular attendant, gave the following evidence:—"I know Mary Lee. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think she could go to London and see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the Court going to her house and she herself coming to the Court." It further appeared that she lived close to the Court. It was proposed to read the deposition on the ground that the witness was "so ill as not to be able to travel" within the meaning of the 17th section of 11 & 12 Vict. c. 42. Certain cases were cited to me in which the words "so ill as not to be able to travel" have received a liberal interpretation. And as the prisoner had clearly embezzled the money, I admitted the evidence subject to a case for the opinion of this Court. On consideration, we are all of opinion that this case was not within the words of the statute, and that it would be dangerous to admit any such latitude of construction as would bring the case within it. The conviction must therefore be quashed.

Conviction quashed.

THE QUEEN *v.* HENRY PEMBLITON.

1874
April 25.

Malicious Injury to Property—24 & 25 *Vict. c.* 97, *s.* 51—*Malice*—*Intention.*

The prisoner had been fighting with persons in the street and threw a stone at them, which struck a window and did damage to an amount exceeding 5*l*. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window :—

Held, that by thus finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed.

CASE stated by the recorder of Wolverhampton.

At the quarter sessions of the peace held at Wolverhampton, on the 8th of January, Henry Pembliton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham," contrary to the provisions of the statute 24 & 25 Vict. c. 97, s. 51. This section of the statute enacts: "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding five years, and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labour."

On the night of the 6th of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk," kept by the prosecutor. About eleven o'clock, p.m., the whole party were turned out of the house for being disorderly, and they then began to fight in the street, and near the prosecutor's window, where a crowd of from forty to fifty persons collected. The

1874

THE QUEEN v. PEMBLITON.

prisoner, after fighting some time with persons in the crowd, separated himself from them and removed to the other side of the street, where he picked up a large stone and threw it at the persons he had been fighting with. The stone passed over the heads of those persons and struck a large plate-glass window in the prosecutor's house and broke it, thereby doing damage to the extent of 7*l.* 12*s.* 9*d.* The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window, and they returned a verdict of "guilty," whereupon the learned recorder respited the sentence and admitted the prisoner to bail, and prayed the judgment of the Court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury the prisoner was rightly convicted or not.

No counsel appeared for the prisoner.

Underhill, for the prosecution. The finding of the jury as to intent is surplusage; directly it is proved that he threw the stone which caused the damage without just cause, the offence is established.

[LUSH, J. That omits the word "maliciously."]

In this Act there are a number of sections in which intent is a necessary ingredient to the offence, and in all of them this is expressed. Thus a distinction is drawn by the legislature, and if intent had been necessary here it would have been inserted. The common law rule as to malice is applicable here, and the consideration arises whether "the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit:" Foster's Crown Cases, p. 256; Russell on Crimes, vol. i. p. 667 (4th ed.). Then here the jury have found that the prisoner was actuated by malice.

[BLACKBURN, J. But only of a particular kind, and not against the person injured.]

In *Reg.* v. *Ward* (1) the prisoner was charged with wounding with intent, and convicted of malicious wounding, though his intention was to frighten, not to shoot the prosecutor.

(1) Law Rep. 1 C. C. 356.

[BLACKBURN, J. There was evidence of malice in that case, and so the conviction was upheld, but here the express finding of the jury negatives malice.]

In *Rex* v. *Haughton* (1) the prisoner set fire to a cowhouse not knowing a cow was in it, and was convicted of maliciously burning the cow. So in Hale's Pleas of the Crown, p. 474, throwing a stone over a wall with intent to do hurt to people passing and killing one of them is treated as murder.

[BLACKBURN, J. Lord Coke, 3 Inst., p. 56, puts the case of a man stealing deer in a park, shooting at the deer, and by the glance of the arrow killing a boy that is hidden in a bush, and calls this murder; but can any one say that ruling would be adopted now?]

The test is whether the act is malicious in itself as in the case of a person wilfully riding an unruly horse into a crowd: East, Pleas of the Crown, p. 231.

[BLACKBURN, J. I should have told the jury that if the prisoner knew there were windows behind, and that the probable consequence of his act would be to break one of them, that would be evidence for them of malice. The jury might perhaps have convicted on such a charge, but we have to consider their actual findings.

The 58th section, which renders it immaterial that there should be malice against the owner of the property or otherwise, applies.

[LORD COLERIDGE, C.J. No, that means against the owner, or some one not owner.]

LORD COLERIDGE, C.J. I am of opinion that the conviction should be quashed. The facts of the case are that there was fighting going on in the streets of Wolverhampton near the prosecutor's house, and the prisoner, after fighting some time, separated himself from the crowd and threw a stone, which missed the person he aimed at, but struck and broke a window, doing damage to the extent of upwards of 5*l*. The question is, whether under an indictment for unlawfully and maliciously injuring the property of the owner of the plate-glass window, these facts will support the indictment when coupled with the other facts found by the jury, that the prisoner

(1) 5 C. & P. 559.

1874

THE QUEEN v. PEMBLITON.

threw the stone at the people intending to strike one or more of them, but not intending to break a window. I am of opinion that the evidence does not support the conviction. The indictment is under the 24 & 25 Vict. c. 97, s. 51, which deals with malicious injuries to property, and the section expressly says that the act is to be unlawful and malicious. There is also the 58th section, which makes it immaterial whether the offence has been committed from malice against the owner of the property or otherwise, that is, from malice against some one not the owner of the property. In both these sections it seems to me that what is intended by the statute is a wilful doing of an intentional act. Without saying that if the case had been left to them in a different way the conviction could not have been supported, if, on these facts, the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary. I do not say anything to throw doubt on the rule under the common law in cases of murder which has been referred to, but the principles laid down in such case have no application to the statutable offence we have to consider.

BLACKBURN, J. I am of the same opinion. We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and malice may be defined to be "where any person wilfully does an act injurious to another without lawful excuse." Can this man be considered, on the case submitted to us, as having wilfully broken a pane of glass? The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do.

PIGOTT, B. I am of the same opinion.

1874

THE QUEEN v. PEMBLITON.

LUSH, J. I am of the same opinion. On these findings we have no alternative. The jury might have found otherwise, but taking this finding I cannot say that there was an intent either actual or constructive, and "malicious" certainly must be taken to imply an intention either actual or constructive.

CLEASBY, B. I am of the same opinion.

Conviction quashed.

Attorney for the prosecution: *Barrow, Wolverhampton.*

THE QUEEN *v.* COOPER.

April 25.

Bailee—Agent—Fraudulent Misappropriation of Security—24 & 25 *Vict. c.* 96, *ss.* 75, 76.

The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage-deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use:—

Held, that no offence had been committed under s. 75 or s. 76 of 24 & 25 Vict. c. 96.

CASE stated by Grove, J.

In this case, tried at the last assizes for the county of Chester, the defendant, an attorney, was indicted under the statute 24 & 25 Vict. c. 96, for having converted to his own use certain money intrusted to him, or received by him as the proceeds of a deed intrusted to him for a special purpose. The indictment contained two counts framed respectively under the 76th and 75th sections of the above statute. (1)

(1) By 24 & 25 Vict. c. 96, s. 75, "Whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of the proceeds, of such security for any purpose or to any person specified in such direction, shall in violation of good faith and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respec-

1874

THE QUEEN v. COOPER.

The facts, so far as they are material to the questions submitted to the Court, were these:—

A Mr. John Whittaker had, before 1867, obtained a loan of 50*l.* from a Mr. Dewsbury on a deposit of title deeds to some leasehold property.

In consequence of Whittaker's wish for a further loan, the defendant in 1867 obtained 140*l.* from a Miss Taylor, and prepared and handed to her brother-in-law, who acted for her, a mortgage deed, receiving the 140*l.* Out of the money which defendant was to receive, he was to pay off Dewsbury and pay the balance to Whittaker. He did not pay Dewsbury, and he only paid Whittaker 60*l.*, on which Whittaker paid him interest, while the defendant, without Whittaker's knowledge, paid the mortgagee's interest on the 140*l.*, Whittaker being also ignorant, at all events for some years, that defendant had obtained so much as 140*l.*

Allowing 10*l.* for the preparation of the mortgage deed, which defendant's brother and former partner said was a fair sum, the defendant would have 70*l.* of Whittaker's in his possession, less the difference of interest which he paid without authority.

Defendant's counsel contended that there was another 30*l.* paid

---

tively; and whosoever having been intrusted, either solely or jointly, with any other person as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security or any power of attorney for the sale or transfer of any share or interest in any public stock or fund whether of the United Kingdom or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate or any part thereof shall be guilty of a misdemeanor."

By s. 76, "Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor."

to Whittaker, which would reduce the sum to 40*l.*; but the evidence preponderated greatly against this. A good many letters were put in to shew the defendant's conduct in the matter, but with these the Court need not be troubled.

After reading to them the material parts of the evidence, the learned judge told the jury that if they were satisfied without reasonable doubt that the defendant received the 140*l.* for Whittaker, and in violation of good faith and fraudulently converted to his own use a substantial part of the money which they considered he should have paid to Whittaker and to Dewsbury for him, they should find him guilty; otherwise not. The jury found a verdict of guilty.

It must be taken by the Court:—

1st. That there were no directions in writing to the defendant to apply the money, or any part of the proceeds of the deed, to any purpose.

2nd. That defendant was entrusted with the mortgage deed with authority to hand it over to the mortgagee or her agent on receipt of the mortgage money, which was to be paid to Dewsbury and Whittaker, less costs of preparing deed.

3rd. That defendant received 140*l.* for Whittaker's use, and in violation of good faith and contrary to the purpose for which such deed and money were entrusted to him, converted a substantial part of the money to his own use.

A copy of the indictment is annexed and formed part of the case.

The questions for the Court were, did the offence committed by the defendant come within either or both the sections above named, viz. the 75th and 76th sections? If within both or either of them the conviction was to be affirmed, if not within either a verdict of not guilty to be entered.

INDICTMENT.

"County of Chester. The jurors for our Sovereign Lady the Queen, upon their oath present that Thomas Cooper, on the 25th day of March, in the year of our Lord, 1867, then being an attorney, and being intrusted with certain property, to wit, the sum of one hundred and forty pounds, of John Whittaker, for safe custody, did then and there unlawfully, and with intent to

1874

THE QUEEN v. COOPER.

defraud, convert and appropriate a certain part of the said property of the said John Whittaker, to wit, the sum of eighty pounds, to and for the use and benefit of himself, the said Thomas Cooper, against the form of the statute, &c.

"And the jurors, &c., do further present that the said Thomas Cooper, on the day and year aforesaid, was intrusted by the said John Whittaker with a certain valuable security, to wit, a deed of mortgage of certain property of the said John Whittaker, to secure the repayment of a sum of one hundred and forty pounds, then lately before agreed to be lent and advanced to the said John Whittaker by one Martha Taylor, such valuable security being intrusted to the said Thomas Cooper as the attorney and agent of the said John Whittaker, for the special purpose and with the intent and object that the said Thomas Cooper should receive from the said Martha Taylor the said sum of one hundred and forty pounds for and on behalf of the said John Whittaker, and having so received such sum should thereout pay the sum of fifty pounds then due and owing from the said John Whittaker to one Nathaniel John Dewsbury, and should pay the remainder of such sum of one hundred and forty pounds to and for the use of the said John Whittaker. And that the said Thomas Cooper having on the day and year aforesaid received from the said Martha Taylor the said sum of one hundred and forty pounds on the deed and valuable security above-mentioned, unlawfully, fraudulently, in violation of good faith, and contrary to the purpose, intent, and object with which such valuable security had been so intrusted to him as aforesaid, did convert to his own use and benefit a certain part of the proceeds thereof, to wit, the sum of eighty pounds, against the form of the statute, &c."

Bowen, Q.C. (*Dunn* with him), for the prisoner, was stopped by the Court.

Torr, Q.C. The prisoner has committed an offence under s. 75, for he had the money for safe custody, though that was not the sole object of his employment. He has also committed an offence under s. 75, for though the first part of that section does not apply for want of a direction in writing, the latter part does.

LORD COLERIDGE, C.J. I think the conviction must be quashed.

The indictment contains two counts, founded upon the 75th and 76th sections of 24 & 25 Vict. c. 96. The 76th section is out of the question, because there has clearly been no improper dealing with any property intrusted to the prisoner for safe custody. Then does s. 75 hit him? The first part of the section cannot apply, because there was no direction in writing. The second part deals with a person who, "having been intrusted with any chattel or valuable security, or any power of attorney for the sale or transfer of any share, &c., for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert, &c. such chattel or security, or the proceeds of the same, or any part thereof, or the share, &c. to which such power of attorney shall relate, or any part thereof." Now the facts of the present case are these. A sum of money was to be raised on mortgage, and the defendant was employed to raise it. Miss Taylor was to advance the money, and a part of it was to be employed in paying off a previous mortgage, and the remainder to be paid over to Whittaker, his employer. The defendant duly prepared the mortgage deed, received the mortgage money, and handed over the deed in exchange for it. So far he acted rightly, and in accordance with his instructions. He afterwards misappropriated a portion of the money he had received. Such a case is not within the section. It applies where property intrusted without authority to sell or deal with it in the other ways mentioned, is improperly sold or otherwise misappropriated.

BLACKBURN and LUSH, JJ., PIGOTT and CLEASBY, BB., concurred.

Conviction quashed.

Attorney for prosecution: *Nordon, Liverpool.*
Attorney for prisoner: *Sherratt, Kidsgrove.*

1874
May 8.

THE QUEEN *v.* FRANCIS.

Evidence—False Pretences—Previous Frauds—Guilty Knowledge.

On the trial of an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. This ring was not produced:—

Held, that the evidence was properly admitted.

Case stated by Blackburn, J.

The prisoner was indicted at Northampton Assizes jointly with one Joseph Roberts. The indictment contained counts for a conspiracy to defraud, and also a count for an attempt to obtain money from one George Walters by false pretences, inter alia, that a ring was a diamond ring; and a count for attempting to obtain money from Caleb Dyer by a similar false pretence.

On the trial, evidence was given that Francis came on the 8th of January, 1873, to the shop of Walters, who is a pawnbroker in Northampton, and asked for an advance of 15*l.* on the pledge of a hoop ring, which he represented to be a diamond ring, a silver watch, and a gold chain. The pawnbroker examined the ring and declared it was not a diamond ring. He refused to advance anything on it. The pisoner Francis, after asking for an advance of 11*l.*, left the shop.

Francis immediately proceeded to the shop of Dyer, who is also a pawnbroker in the same street, and asked for an advance of 13*l.* on the same property. He obtained no advance, and was taken into custody on a charge of giving a false name and address under the Pawnbrokers Act.

The ring was produced in Court, and evidence was given that the stones were not diamonds, but crystals, and were not worth more than 6*d.* each.

Francis' statement when taken, and his defence at the trial, was that he did not know that the ring was false, he being employed,

1874

THE QUEEN v. FRANCIS.

as he said, by Roberts to pawn the ring, and believing his assertion that it was a diamond ring.

Evidence was then offered, in order to prove guilty knowledge in Francis, that he had shortly before offered other false articles to other pawnbrokers. The learned judge admitted the evidence, but as the cases relied on by the prosecution were all cases either of forgery or uttering counterfeit coin, he reserved the question whether on such a charge as this such evidence was admissible for the purpose of proving guilty knowledge.

A witness was called who proved that on the 6th of January, 1873, at Bedford, the prisoner Francis obtained 35*s.* from a pawnbroker of the name of Lazenby, on the pledge of a chain, represented by him to be a gold chain, and that he then gave a false name and address. The chain was produced in Court, and evidence was given that it was silver coated with gold, and not worth 35*s.*

On the same day, the 6th of January, Francis, at Leicester offered to a pawnbroker called Stowe, who was called as a witness, in pledge a watch and a cluster ring, consisting, as he said, of diamonds, and asked for an advance of 15*l.* upon them. The pawnbroker refused to advance anything, telling him the ring was not a diamond ring.

On the same day Francis offered in pawn to Taylor, also called as a witness, the son of a pawnbroker in Leicester, a watch and a cluster ring, which he said was a diamond ring, and asked 13*l.* on them. Taylor thought the ring not a diamond ring, but did not say so to the prisoner. He told him that he could not advance so much in the absence of his father, and desired the prisoner to come again next day. He did not do so.

The cluster ring mentioned by these two witnesses was not produced in Court, and the only evidence that it was false was the opinion of Stowe and Taylor that it was so.

There was no sufficient evidence against Roberts, and the learned judge directed his acquittal, and a verdict of not guilty on the counts for a conspiracy.

The learned judge left to the jury the case against Francis on the counts for an attempt to obtain money by false pretences, telling them that it was of the essence of the charge, not only that

1874

THE QUEEN v. FRANCIS.

Francis attempted to obtain the advance on the ring as a diamond ring when it was not, but also that he then had guilty knowledge that it was not. And he left to them, as evidence of that guilty knowledge, the previous transactions.

The jury found him guilty.

The learned judge had no doubt that the evidence admitted had much weight with them, and therefore, if the evidence was improperly received, the conviction should be quashed.

The question for the opinion of the Court was, whether the evidence above mentioned was properly received for the purpose of proving guilty knowledge.

April 25. *Hensman*, for the prisoner. Evidence of previous specific criminal acts is not, according to the general rules of evidence, admissible on the trial of a criminal charge: the cases of forgery and uttering are exceptional (1 Russell on Crimes, 4th ed. p. 127). In cases of receiving stolen goods, evidence of the receipt of other goods stolen from other owners was not at common law admissible: *Reg.* v. *Oddy*. (1) The law as to receiving was in this respect altered by 34 & 35 Vict. c. 112, s. 19. In *Reg.* v. *Holt* (2) it was decided that, on a trial for obtaining money by false pretences, evidence of a previous obtaining of money from another by the same false pretences was inadmissible.

[BLACKBURN, J. There the alleged false pretence was an assertion of authority to receive the money, and the question was, authority or no authority. The evidence was wholly irrelevant.

LUSH, J. May not this evidence be admissible to shew that the prisoner knew true from false, and so to shew fraudulent intent?]

Evidence is not admissible for that purpose where the facts offered in evidence themselves amount to a substantive crime. But further, if evidence be admissible for such a purpose, it must be directly to the point. And one part of the evidence admitted in this case was of a previous dealing with a sham gold chain. How can that shew anything of the prisoner's knowledge of diamonds?

[BLACKBURN, J. Such evidence appears to have been admitted

(1) 2 Den. Cr. C. 264; 21 L. J. (M.C.) 198.
(2) Bell, Cr. C. 280; 30 L. J. (M.C.) 11.

in the case of murder by poison: *Reg.* v. *Geering* (1) and *Reg.* v. *Garner.* (2)]

In those cases, and in others like them, the several crimes proved were all parts of substantially one transaction.

[BLACKBURN, J. In *Reg.* v. *Richardson* (3) like evidence was received in a case of embezzlement.]

Yes, but all the acts were part of one fraud.

[COLERIDGE, C.J. referred to *Reg.* v. *Gray* (4) as to arson.]

Moreover, if any such evidence as that tendered was admissible, it ought not to have been received without the production of the alleged fraudulent articles.

[PIGOTT, B. Certainly, if the prisoner were on his trial for the alleged prior frauds, a conviction would not be allowed without production.]

And it is the same when they are proved for the present purpose. Even in cases of forgery, where more laxity prevails with regard to such evidence, production has always been required: *Reg.* v. *Millard* (5); *Rex* v. *Forbes* (6); *Rex* v. *Cooke.* (7)

[*Reg.* v. *Findge* (8) and *Rex* v. *Whiley* (9) were also cited.]

No counsel appeared for the prosecution.

Cur. adv. vult.

May 8. The judgment of the Court (Lord Coleridge, C.J., Blackburn and Lush, JJ., and Pigott and Cleasby, BB.), was delivered in the Court of Common Pleas by

LORD COLERIDGE, C.J. In this case the question reserved for the Court is, whether the evidence mentioned in the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that evidence, the judge who tried the case not entertaining any doubt that if the evidence was properly received the verdict was justified.

It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge

(1) 18 L. J. (M.C.) 215.
(2) 3 F. & F. 681.
(3) 2 F. & F. 343.
(4) 4 F. & F. 1102.
(5) R. & R. 245.
(6) 7 C. & P. 224.
(7) 8 C. & P. 586.
(8) Leigh & Cave C. C. 390; 33 L. J. (M.C.) 74.
(9) 2 Lea. Cr. C. 983.

1874

THE QUEEN v. FRANCIS.

of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shews he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority. In the case of *Rex* v. *Tattersall*, mentioned by Lord Ellenborough in *Rex* v. *Whiley* (1), the question reserved by Chambre, J., was whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another. The opinion of the judges was that the jury were at liberty to make such an inference. The cases in which this has been acted on are most commonly cases of uttering forged documents or base coins, but they are not confined to those cases.

Now, in the present case, the prisoner was tried on two charges of attempting on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones. Evidence that he, on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold, when it in fact was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine, and that inference was greatly strengthened by the fact that he at that time gave a false name, and though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had guilty knowledge is as legitimate as if it had been a second false chain.

It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt if there was not admissible evidence that

(1) 2 Lea. Cr. C. 983.

this ring was false it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility, of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that, when the issue is as to the state of a chattel, e.g. the soundness of a horse, or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in court for the inspection of the jury. The law of evidence is the same in criminal and civil suits. The conviction, therefore, should be affirmed.

Conviction affirmed.

Attorneys for prisoner: *Phelps & Sidgwick, for A. J. Jeffrey, Northampton.*

END OF EASTER TERM, 1874.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXVIII VICTORIA.

1874
Nov. 14.

THE QUEEN *v.* HAZELTON.

False Pretences—Cheque given for Goods—No Balance at Bank.

The prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain cheques were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited except a few shillings. Various cheques of his had been refused payment, and he would not have been permitted to overdraw. He did not intend when he gave the cheques to the prosecutor to meet them, but intended to defraud:—

Held, that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount.

Case stated by the common serjeant of London:—

At the October session of the Central Criminal Court, William Hazelton was tried on an indictment for obtaining goods by false pretences, the first count of which alleged that the defendant, on the 4th of April, 1874, did unlawfully and knowingly falsely pretend to Robert Young and another that he then had money to the amount of 5*l.* in a certain bank, called the Birkbeck Bank, at Nos. 29 and 30 Southampton Buildings, Chancery Lane, in the county of Middlesex, that he then had authority to draw a cheque upon that bank for the sum of 5*l.*, and that a certain paper writing which he then produced and delivered to the said

Robert Young and another then was a good and valid order for the payment of money, to wit for 5*l.*, and that by means of those false pretences he unlawfully and fraudulently obtained from them thirty-three shirts, with intent to defraud.

The second count charged him with obtaining from the same persons, on the 7th of April, forty shirts by exactly similar false pretences, in respect of a cheque for 8*l.* 8*s.* given by him upon the same bank.

There were other counts charging the prisoner with obtaining goods by similar false pretences, with regard to cheques upon other banks. Some of these counts also charged as a false pretence the pretence that the prisoner kept a banking account with the bank upon which the cheques were drawn.

It was proved in evidence that the prisoner opened an account at the Birkbeck Bank on the 30th of June, 1873, with a payment to his credit of 22*l.* 10*s.*, and had a cheque book given to him for his use, containing fifty blank cheques. That on the 9th of December, 1873, the balance in his favour in the Birkbeck Bank was five shillings and three pence, and the account remained unaltered up to the 27th of June, 1874, when he applied to the Birkbeck Bank for a new cheque book, which they refused, and then he withdrew 5*s.* He could have had the 3*d.* That thirty-three of his cheques were honoured and about seventeen refused by the Birkbeck Bank. That he would not have been allowed to overdraw his account at the Birkbeck bank.

The following evidence was also adduced:—

On the 2nd of April, 1874, the prisoner went to Messrs. Young & Rochester's, and ordered over two dozen shirts, and called again for them about two o'clock in the afternoon of the 4th, and said he wished to pay ready money, and an invoice was made out and discount deducted from the invoice, making the sum of 7*l.* 5*s.*, and prisoner gave a cheque on the Birkbeck bank for 5*l.*, and paid the balance of 2*l.* 5*s.* in cash.

The 4th of April was Saturday, the 5th was Sunday, and the 6th a bank holiday, so that the prisoner's cheque could not be presented for payment until the 7th. Early in the morning of the 7th, before 10 o'clock, a.m., the prisoner went again to Young & Rochester's, and ordered other goods to the amount of 8*l.* 8*s.*,

1874

THE QUEEN v. HAZELTON.

and said he wished to pay ready money, and discount was allowed to him. He gave his cheque on the Birkbeck Bank for the amount, and took away the goods.

Both the above cheques were presented to and dishonoured by the Birkbeck Bank.

Some of the above goods were pawned by the prisoner in the name of Williams, on the 13th and 17th of April, for 1*l.* 6*s.*, with a pawnbroker who knew him well for two or three years before in that name, and who said his dealings were satisfactory, and that the goods pawned by him were usually redeemed. But at the time of the trial that pawnbroker had 35*l.* worth of goods in pawn by the prisoner.

Other of the above goods were pawned by prisoner on the 30th of April, the 15th of August, and the 9th of September, with another pawnbroker, to whom prisoner was known for two years, and who said that he usually redeemed the goods pawned.

Other of the same goods were pawned with another pawnbroker to whom prisoner was known, and who said that he in all cases redeemed the goods pawned by him, but that he, the pawnbroker, had at the time of the trial, goods to the amount of 12*l.* in pawn by the prisoner.

Evidence was also given of other cheques upon other banks being given in exchange for other goods under like circumstances, being the transactions the subject of the latter counts of the indictment.

Evidence was also given of the dishonour of about twelve other cheques drawn and given by the prisoner in payment for other goods bought by him, and of his unperformed promises after dishonour to the holders of the cheques to take them up.

A detective police officer proved that he went to the prisoner's house on the 15th of September, and got in at the back through the garden; that the prisoner tried to escape, but was apprehended. He was told he was taken for obtaining goods from Candy's (one of the persons from whom he had obtained goods); and he replied, "It's a debt, not a fraud; and you can't make a fraud of it." Being asked if he had any duplicates in the house he said, "No." The officer found, however, on search 185 duplicates and pawnbrokers' contract notes, representing together

pawnings and deposits to the amount of about 330*l.* The officer also found invoices from various firms, and the prisoner's cheque-books on the three banks mentioned in the indictment, and his pass-book of the Birkbeck Bank. Scarcely a single article of furniture was found in the house, but amongst the duplicates found were some for household furniture pawned by the prisoner.

It appeared, therefore, by the evidence, that at the time he gave in payment the two cheques on the Birkbeck Bank for 5*l.* and 8*l.* 8*s.*, mentioned in the first and second counts, the prisoner's account there was still an open one, but the balance in that bank to his credit was 5*s.* 3*d.* only, and that his cheques for sums exceeding that balance were dishonoured, and he would not have been allowed to overdraw.

The learned common serjeant doubted upon the decided cases whether, in point of law, a man who gives a cheque in payment, under the circumstances before mentioned, does by the mere fact of giving the cheque, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment, viz.: 1. That he then has money to the amount of the cheque in the bank upon which it is drawn. 2. That he then has authority to draw upon the bank for that sum. 3. That the cheque which he gives is a good and valid order for the payment of its amount. 4. That he then has a banking account with the bank upon which his cheque is drawn and where his account is overdrawn.

He summed up the case to the jury, and they found that the prisoner did not intend, when he gave the respective cheques mentioned in the indictment, to meet them and that he intended to defraud.

A verdict of "guilty," was thereupon recorded, and the learned common serjeant reserved for the opinion of this Court the question, whether there was any evidence to go to the jury of the prisoner having made any of the false pretences mentioned in the indictment. If there was, the conviction was to be confirmed. If there was not, it was to be reversed.

It also clearly appeared that many of the prisoner's cheques, other than those mentioned in the indictment, on the before-mentioned banks had been and were afterwards dishonoured.

No counsel appeared for the prisoner.

1874

THE QUEEN v. HAZELTON.

Besley, for the prosecution. Where a person obtains goods by giving a cheque upon a bank where he has no account, the authorities shew that that is a false pretence: *Rex* v. *Jackson* (1); *Reg.* v. *Parker*. (2) And it is the same thing when, as here, the prisoner has no balance and no substantial account. And *Reg.* v. *Parker* (2) is express to shew that the third, at least, of the pretences laid is proved. [He also cited *Rex* v. *Lockett* (3); *Reg.* v. *Giles*. (4)]

KELLY, C.B. There are two questions in this case; first, whether the prisoner has expressly or impliedly made a representation upon the faith of which goods have been obtained, and, secondly, whether that representation was false.

Several representations are laid in the indictment, and are proposed to us in the case as arising from the conduct of the prisoner in the present case. It is suggested that a person acting as the prisoner did represents that he then has money, to the amount of the cheque which he tenders, in the bank upon which it is drawn. If this had been the only representation suggested there would have been great difficulty in upholding the conviction. The giving of a cheque does not necessarily imply any such representation. Not only may a banking account be kept under a guarantee upon the express terms that it may be overdrawn, but, without any such arrangement, a person of position may often overdraw an account in perfect good faith and with the tacit sanction of his bankers.

Then it is suggested that the conduct of the prisoner amounted to a representation that he had authority to draw upon the bank for the sum for which he drew. I think that representation does arise. I do not see how it can but be implied.

But as to the third representation there can be no doubt, namely, that the cheque is a good and valid order for the payment of its amount. The case which has been cited, *Reg.* v. *Parker* (2), is express upon the point; and that the goods were obtained upon the faith of the representation admits of no question.

It remains to consider whether the representation made was

(1) 3 Camp. 370.
(2) 7 C. & P. 829; 2 Moo. Cr. C. 1.
(3) 1 Lea. Cr. C. 94.
(4) Leigh & Cave, Cr. C. 502; 34 L. J. (M.C.) 50.

untrue. If a man's account were overdrawn, and he had reason to suppose that his cheque would still be honoured, this might be consistent with his having authority to draw and with his cheque being a good and valid order. But, in the present case it is quite clear that the prisoner knew that his account at the bank was virtually closed, and that he knew his cheque would not be paid. He had, therefore, no authority to draw. And his cheque was not a good and valid order, that is to say, one which might be cashed.

LUSH, J. I think giving a cheque is not a representation that the giver then has funds in the bank to the amount of the cheque. Many a man draws a cheque, either intending to pay in money to meet it or having a right to overdraw. But here the prisoner, when he obtained the goods, said that he wished to pay ready money. And that amounts to a representation that the cheque was equal to cash, whereas he had no real account at the bank at all. The facts, therefore, support either the second or the third of the false pretences charged.

BRETT, J. It is material, first, to see exactly what the question asked of us is. In order to constitute the offence charged in the indictment a man must make a pretence or representation as to existing facts; it must be false to his knowledge; money or goods must be obtained thereby, and with intent to defraud. Now the case states that the common serjeant "doubted, upon the decided cases, whether in point of law a man who gives a cheque in payment under the circumstances before mentioned does by the mere fact of giving the cheque, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment (which he enumerates). And the question asked of us is whether there was any evidence to go to the jury of the prisoner having made any of the false pretences mentioned in the indictment. The only question asked of us is whether there was evidence of any of the representations mentioned.

The first representation suggested is that the prisoner, when he gave the cheque, had a balance in the bank sufficient to meet it. A representation must depend upon what a man says and does, and what his words and acts would convey to the mind of another. It cannot depend upon the state of his own mind. Now, it is a

1874

THE QUEEN v. HAZELTON.

matter of common knowledge that people do draw cheques, though they have not at the time funds at their bankers. Therefore, this representation cannot arise.

The second suggested representation is, that the prisoner had authority to draw for the amount. If giving a cheque in payment does not mean this, it means nothing. There is, therefore, evidence of this representation.

As to the third representation charged, but for the authorities I should have doubted. But upon the authorities I think it does arise.

I also think there is evidence of the fourth false representation charged.

QUAIN, J. I think the conviction must be affirmed, upon the third representation charged, upon the authority of *Reg.* v. *Parker*. (1) The only differences between that case and this are, that there the prisoner had no account at all at the bank, and that the cheque was post-dated. But the last point of distinction can make no difference. And I think, when the prisoner, as here, had no balance, that was practically the same thing as having no account.

POLLOCK, B. I prefer answering the question put by saying that there was evidence of the third false pretence laid in the indictment. I think the real representation made is that the cheque will be paid. It may be said that that is a representation as to a future event. But that is not really so. It means that the existing state of facts is such that in ordinary course the cheque will be met.

Conviction affirmed.

Attorneys: *Rooks, Kenrick, & Co.*

(1) 7 C. & P. 829; 2 Moo. Cr. C. 1.

END OF MICHAELMAS TERM, 1874.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXVIII VICTORIA.

THE QUEEN *v.* HENRY THOMAS.

1875
Jan. 23.

Counterfeit Coin—Previous Conviction—Indictment for Felony—Misdemeanor—24 & 25 Vict. c. 99, ss. 12, 37.

The prisoner was indicted under 24 & 25 Vict. c. 99, s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence. The jury found him guilty of the uttering, but negatived the previous conviction :—

Held, that he could not be convicted of the misdemeanor of uttering.

CASE stated by the common serjeant of the city of London.

At a session of the Central Criminal Court on Monday, the 11th of January, 1875, Henry Thomas was tried on an indictment (of which a copy is hereto annexed) for uttering counterfeit coin after having been previously convicted of a like offence.

The 12th section of 24 & 25 Vict. c. 99 (1), declares that when a person utters counterfeit coin, and has been previously convicted

(1) By 24 & 25 Vict. c. 99, s. 12: "Whosoever having been convicted either before or after the passing of this Act of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence."

Sect. 37: "Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the

1875

THE QUEEN v. THOMAS.

of a like offence, he shall be guilty of felony, and the 37th section of the same statute declares that in the indictment for such felony it shall be sufficient, after charging such subsequent offence, to state the substance and effect only of the indictment and conviction for the previous offence, and directs that the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and that the jury shall be charged in the first instance to inquire concerning such subsequent offence only.

It will be seen that the indictment first charges (in the first count) that the prisoner unlawfully uttered the coin; next that he had been before convicted, and then states the legal conclusion,

---

formal part) of the indictment and conviction for the previous offence, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence purporting to be signed by the clerk of the court or other officer having, or purporting to have, the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the Court. . . . and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say), the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence; and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the Court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions; and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if, upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

that he therefore feloniously uttered the coin. The second count charges the uttering to be felonious throughout it.

Upon the trial of the said Henry Thomas, he was found guilty by the jury of the subsequent offence, that is to say, of the unlawful uttering of the counterfeit florin to Eliza Cunningham, but the previous conviction alleged against him was clearly negatived, and the jury acquitted him of having been so previously convicted. He was, therefore, found guilty of a misdemeanor, upon a count of an indictment, which count charged him in fact with a felony consisting of two elements, namely, a misdemeanor and a prior conviction. Not being aware of any instance in which, without the aid of a statute, an offender can be convicted of a misdemeanor on a count for felony, the learned common serjeant had to consider whether, in this particular case, the averments in the first count were divisible, and whether the prisoner could be convicted of the misdemeanor of uttering counterfeit coin of which the jury had found him guilty. The learned common serjeant ruled that under this particular statute the averments in the first count were divisible, and that though the whole count taken together charged a felony, yet that as the felony was only a felony by reason of the alleged previous conviction, the failure in proof of that previous conviction left the offence a misdemeanor of which the jury had found him guilty, and he directed his conviction of a misdemeanor to be recorded.

It will be observed that there is this difference in the two counts of this indictment; that the first count charges a substantive misdemeanor of uttering the counterfeit florin to E. Cunningham, and then proceeds to charge the circumstance of aggravation, which, if proved, would convert the misdemeanor into a felony; but in the second count the uttering of the counterfeit florin to E. Cunningham is throughout alleged to be felonious.

The learned common serjeant reserved for the Court for Consideration of Crown Cases Reserved the question whether the said Henry Thomas was legally convicted of the misdemeanor of uttering the counterfeit florin to E. Cunningham.

Indictment: 1st count, that Henry Thomas on the 18th of December, 1874, one piece of false and counterfeit coin, resembling,

1875

THE QUEEN v. THOMAS.

and apparently intended to resemble and pass for a piece of the Queen's current silver coin called a florin, unlawfully, unjustly, and deceitfully did utter and put off to one Eliza Cunningham, he, the said Henry Thomas, then knowing the same to be false and counterfeit against the form, &c. And that heretofore and before the committing of the offence hereinbefore mentioned, to wit, at the general session of the delivery of the Queen's gaol of Newgate, holden for the jurisdiction of the Central Criminal Court at Justice Hall, in the Old Bailey, in the suburbs of the City of London, on Monday the 11th of December, 1871, the said Henry Thomas was in due form of law convicted of a certain indictment against him for unlawfully and knowingly uttering to Ann Biggs a counterfeit florin, at the same time having one other counterfeit florin in his possession against the form, &c. And that the said Henry Thomas was thereupon ordered to be imprisoned and kept to hard labour for two years, and to be subject to police supervision for five years. And so that the said Henry Thomas, on the day and year first aforesaid feloniously and unlawfully did utter the said piece of false and counterfeit coin to the said Eliza Cunningham in manner and form aforesaid, and against the form, &c.

2nd count, that the said Henry Thomas, on the 18th of December, 1874, one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the Queen's current silver coin called a florin, unlawfully, unjustly, deceitfully and feloniously did utter and put off to the said Eliza Cunningham, he, the said Henry Thomas then knowing the same to be false and counterfeit, against the form, &c. And that heretofore and before the committing of the offence in this count mentioned, to wit, at the general session of the delivery of the Queen's gaol of Newgate, holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the city of London, on Monday, the 11th of December, 1871, the said Henry Thomas was in due form of law convicted on a certain indictment against him for unlawfully and knowingly uttering to Ann Biggs a counterfeit florin, at the same time having one other counterfeit florin in his possession, against the form, &c. And that the said Henry Thomas was thereupon ordered to be

imprisoned and kept to hard labour for two years, and to be subject to police supervision for five years. 1875

THE QUEEN v. THOMAS.

No counsel appeared for the prisoner.

Poland, for the prosecution. The prisoner was convicted under an indictment which charged, first, an act which by itself amounted to a misdemeanor under s. 9; and, secondly, a previous conviction which, under s. 12, would turn the misdemeanor into felony. The procedure is provided for by s. 37. The two questions are to be tried separately, and the jury are to find separately upon each. Why should not the prisoner, then, be convicted of the misdemeanor of which he has been found guilty, because the other fact has not been found which would have made his offence felony?

[QUAIN, J., referred to 14 & 15 Vict. c. 100, s. 12.]

On an indictment for murder a man may be found guilty of manslaughter.

[LORD COLERIDGE, C.J. Both are felonious.]

In *Reg.* v. *Hodgkiss* (1), on an indictment for perjury, a conviction for a false oath was sustained.

[LORD COLERIDGE, C.J. Both are misdemeanors.

MELLOR, J. In the cases of rape, of cutting and wounding, and many others, statutory provision has been made to meet the difficulty.]

The distinction between felony and misdemeanor has now been practically abolished by 33 & 34 Vict. c. 23.

[MELLOR, J. There are still distinctions between the two; for instance, with respect to the jury.]

LORD COLERIDGE, C.J. This conviction must be reversed. By English law felony and misdemeanor are different things; and on an indictment for one there can be no conviction of the other, except by express statutory enactment. At common law, upon an indictment for a felony there may be a conviction for another and cognate felony; and so, on an indictment for a misdemeanor, a conviction of a like misdemeanor. In the present case, although the previous conviction is to be kept from the jury until they have decided the other point as to the subsequent offence, the offence

(1) Law Rep. 1 C. C. 212.

1875

THE QUEEN v. THOMAS.

is still a compound one, and the previous conviction is a part of the offence and a necessary ingredient in it. The two findings of the jury, therefore, amount to a verdict of not guilty. We have to interpret the law, not to make it. And if the state of the law is unsatisfactory, any alteration must be made by the legislature.

MELLOR, J. I am of the same opinion. In many cases to which the rule of the common law would otherwise apply, there is express statutory provision made. But here no statute applies.

QUAIN, J., concurred.

GROVE, J. I am of the same opinion. When first I read s. 37 I was inclined to think differently. But I am now satisfied that the words "such verdict of guilty" apply to the whole compound felony, consisting of the two ingredients.

AMPHLETT, B., concurred.

Conviction quashed.

Attorney for prosecution: *Solicitor to the Treasury.*

END OF HILARY TERM, 1875.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXVIII VICTORIA.

THE QUEEN *v.* TAYLOR.

1875
April 24.

Accessory before the Fact—Manslaughter—Fight—Stakeholder.

Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight each put down 1*l.*, so that 2*l.* might be paid to the winner. The prisoner consented to hold the 2*l.*, and pay it over to the winner. Otherwise, he had nothing to do with the fight, and he was not present at it. There was no reason to suppose that the life of either man would be endangered.

The men fought, and one of them received injuries of which he afterwards died. The prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the 2*l.* to the winner:—

Held, that the prisoner was not an accessory before the fact to the manslaughter of the man killed.

CASE stated by Brett, J.

William Taylor was tried at the Central Criminal Court, on the 8th of April, 1875, on a charge that he was an accessory before the fact to the manslaughter of one Dulgar by one Tubbs. It was proved that Tubbs and Dulgar had quarrelled, and had, in consequence, agreed to fight with their fists; and that in order to bind each other so to fight upon such quarrel, each put down a sum of 1*l.*, so that 2*l.* might be paid to the winner; that the money was deposited with the prisoner as a stakeholder, and that he consented to hold it as such until after the fight, and then pay it to the winner.

The prisoner did not in any way, otherwise than by so consenting to hold and pay over the money, promote or encourage either the quarrel or the fight. There was nothing then, or at any time before the fight, to lead any one reasonably to suppose, and the prisoner did not suppose, that the fight would endanger the life of

1875

THE QUEEN v. TAYLOR.

either of the combatants. Tubbs and Dulgar fought on the 1st of February, 1875. The prisoner was not present at the fight. The fight was a fair fight, in which the men used only their fists. Until near the close, there was no danger of death to either of them, and no reason to apprehend such danger. Towards the end Dulgar was advised to yield, but refused, and continued to fight. At last he yielded, and acknowledged that he was beaten.

If Dulgar had not so continued to fight he would not have died or have been in danger of dying. By so continuing to fight and thereby receiving further injuries from Tubbs, Dulgar became exhausted, and afterwards, in consequence, died. Tubbs was tried and pleaded guilty to a charge of manslaughter, and was sentenced. After the fight, the prisoner, on being told that Tubbs had won the fight, but without being told or knowing of Dulgar's danger, paid the 2*l.* to Tubbs.

The learned judge directed the jury, for the purpose of the day, that if the prisoner held the money for the purpose of handing it to the winner of the proposed fight, he was by that alone, in point of law, an accessory before the fact to the breach of the peace which subsequently took place, and inasmuch as that breach of the peace ended in manslaughter, he was an accessory before the fact to that manslaughter. The jury thereupon found the prisoner guilty. The learned judge respited the sentence.

The learned judge desired the opinion of the Court of Criminal Appeal, whether such direction was correct in point of law, and whether upon such direction and facts the prisoner could properly be convicted of the crime of being an accessory before the fact to the crime of manslaughter.

If the Court should be of opinion that the prisoner was properly convicted on such direction and facts, the conviction was to stand, if otherwise, the conviction was to be quashed.

No counsel appeared for the prisoner.

Poland, for the prosecution. The prisoner was an accessory by abetting the fight. He consented to hold the stakes which were deposited for the very purpose of binding the men to fight.

[MELLOR, J. Can there be an accessory before the fact to a manslaughter of this kind, which is not in any way contemplated beforehand, but which occurs accidentally ?]

A person who is a party to the breach of the peace which is contemplated, becomes thereby accessory to the manslaughter which occurs during the course of it: *Reg.* v. *Gaylor* (1); Hawkins' Pleas of the Crown, book 2, ch. 29, ss. 16, 17, 18.

COCKBURN, C.J. This conviction cannot be supported. The indictment was for abetting a manslaughter. The facts were that the manslaughter occurred in the course of a fight. The accused was not present at the fight, and all he had to do with it was that he consented to hold 2*l.*, which the men about to fight deposited by way of binding themselves to fight, and to be given to the winner. It appears to me that to support an indictment against a man as an accessory by abetting an offence, there must be some sort of active proceeding on his part. He must incite, or procure, or encourage the act. At first I was struck with the view that the stakes were something essential to the fight, and that the prisoner by holding the stakes might be said to participate in the fight. But I do not think the mere consent to hold the stakes can be said to amount to such a participation as is necessary to support the conviction.

The question suggested by my Brother Mellor, whether there can be an accessory before the fact to a manslaughter of this nature, is one of great difficulty, and it is not necessary to decide it in the present case.

BRAMWELL, B. I am of the same opinion. The question is whether there has been an abetting. I think there has not. Nothing that the accused did assisted or enabled the fight to take place.

MELLOR, J. I am of the same opinion. We need not settle the question to which I called attention during the argument. For there is no evidence that the accused engaged the two men to fight, or assisted or counselled them to it.

BRETT, J., and POLLOCK, B., concurred.

Conviction quashed.

Attorney for prosecution: *Solicitor to the Treasury.*

(1) Dears. & B. Cr. C. 288.

1875
April 24.

THE QUEEN *v.* FOULKES.

Embezzlement—Clerk or Servant.

The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use:—

Held, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement.

CASE stated by Quain, J.

The prisoner was tried at the last assizes for Shropshire for embezzlement. The indictment on which the prisoner was tried contained four counts. On the first count he was charged, that on the 22nd of September, 1871, he was employed as clerk to the local board of Whitchurch and Dodington, and received 600*l.* on account of the said local board, and did steal 100*l.*, parcel of the said 600*l.*, the moneys of the said local board, his employers. On the second count, that on the 14th of February, 1872, he embezzled the sum of 100*l.*, the moneys of the said local board, his employers. On the third count, that on the 22nd of September, 1871, he embezzled the sum of 100*l.*, parcel of a sum of 600*l.*, the moneys of Charles Foulkes, his master. On the fourth count, that on the 14th of February, 1872, he embezzled the sum of 100*l.* the moneys of Charles Foulkes, his master. Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitchurch and Dodington, at a salary of 40*l.* a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no

evidence that prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk or servant or assistant in his office as above described. In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of the loan for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was, that prisoner received at his father's office the money from the mortgagees, in exchange for the mortgages, and paid it into the Whitchurch and Ellesmere Bank (who were the treasurers of the board) to an account called the "market account." In the course of this employment he embezzled and appropriated to his own use the two sums of money mentioned in the indictment. It was objected by counsel for the prisoner, that he could not be convicted on the first two counts of the indictment, as he was not a clerk or servant of the board, nor employed by the board in that or any other capacity; and that he could not be convicted on the third or fourth counts, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity, beyond the fact that he assisted his father ; and that the moneys embezzled were not the moneys of Charles Foulkes, but of the local board. The prisoner was convicted and sentenced, but the learned judge respited the execution of the sentence till after the decision of the Court on this case. The question for the Court was, whether upon the above facts the prisoner could be properly convicted on any of the counts of the indictment. The following cases were cited before the learned judge: *Reg.* v. *Negus* (1), *Reg.* v. *Beaumont* (2), *Reg.* v. *Tyree* (3); and the 11 & 12 Vict. c. 63, s. 138, was referred to as authorizing the board (the district being a non-corporation district) to allege that the property was the property of their clerk.

Rose, for the prisoner. The prisoner could not properly be con-

(1) Law Rep. 2 C. C. 34. (2) Dears. Cr. C. 270; 23 L. J. (M.C.) 54.
(3) Law Rep. 1 C. C. 177.

1875

THE QUEEN v. FOULKES.

victed of embezzlement. To constitute embezzlement by a person "being a clerk, or servant, or being employed for the purpose or in the capacity of a clerk or servant" (1), there must be a contract of service of some kind express or implied. In the present case there was none; for the prisoner was in no sense in the employment of the local board, and the services he rendered to his father were mere voluntary services, not rendered in pursuance of any contract. [He cited *Rex* v. *Burton* (2); *Rex* v. *Nettleton* (3); *Reg.* v. *Bowers* (4); *Reg.* v. *Tyree* (5); *Reg.* v. *Turner* (6); *Reg.* v. *Cullum* (7); *Reg.* v. *Negus* (8)]

No counsel appeared for the prosecution.

COCKBURN, C.J. I think there was evidence on which the jury might well find that the prisoner either was a clerk or servant, or was employed as a clerk or servant. The father held various offices, and the prisoner, his son, in consequence of his father's illness, or for other reasons, did the duties which the father would otherwise have had to do himself or to employ a clerk to do. It is true there was no contract binding him to go on doing those duties. But the relation of master and servant may well be terminable at will, and while the prisoner did act he was a clerk or servant.

The second question is, whether there was an embezzlement. I think there was. The money was to be received by the father, though received for the local board. He was the proper custodian of the money, and the son received it for him. There was, therefore evidence upon both points.

BRAMWELL, B. I am of the same opinion. If the prisoner had not been the son of the man for whom he acted, and had not lived

(1) By 24 & 25 Vict. c. 96, s. 68: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer . . . shall be deemed to have feloniously stolen the same from his master or employer . . ."

(2) 1 Moo. Cr. C. 237.

(3) 1 Moo. Cr. C. 259.

(4) Law Rep. 1 C. C. 41.

(5) Law Rep. 1 C. C. 177.

(6) 11 Cox Cr. C. 551.

(7) Law Rep. 2 C. C. 28.

(8) Law Rep. 2 C. C. 34.

with him, it is abundantly evident that he would have been a clerk or servant, and would have been entitled to payment upon a quantum meruit. Then what difference can his being a son make. It may affect the nature of his remuneration; but nothing else.

With regard to the money, the father might have had to account for it; but he was entitled to receive it from the son. Therefore there was an embezzlement.

MELLOR, J. The only difficulty which I can collect that the learned judge felt was, that there was no evidence of an actual contract of employment. But there is clear evidence that in what the prisoner did he was a clerk or servant.

BRETT, J. The prisoner undertook to do things for his father which a clerk does for his master, and to do them in the way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

POLLOCK, B. If it had been necessary to say absolutely that the prisoner was a clerk or servant, I should have hesitated. But I think the words "employed as a clerk or servant," are wider, and that there is evidence to bring the case within them.

Conviction affirmed.

Attorney for prisoner: *G. F. Cook, for Chandler, Shrewsbury.*

END OF EASTER TERM, 1875.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

TRINITY TERM, XXXVIII VICTORIA.

1875
June 26.

REG. *v.* PRINCE.

Abduction—Girl under Sixteen—Bonâ fide and reasonable Belief that she was older—Mens rea—24 & 25 Vict. c. 100, *s.* 55.

The prisoner was convicted under 24 & 25 Vict. c. 100, s. 55, of unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her father. It was proved that the prisoner did take the girl, and that she was under sixteen; but that he bonâ fide believed and had reasonable ground for believing that she was over sixteen:—

Held, by Cockburn, C.J., Kelly, C.B., Bramwell, Cleasby, Pollock, and Amphlett, BB., Blackburn, Mellor, Lush, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ., Brett, J., dissenting, that the latter fact afforded no defence, and that the prisoner was rightly convicted.

CASE stated by Denman, J.

At the assizes for Surrey, held at Kingston-upon-Thames, on the 24th of March last, Henry Prince was tried upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. The indictment was framed under s. 55 of 24 & 25 Vict. c. 100. (1)

He was found guilty.

(1) By 24 & 25 Vict. c. 100, s. 55, "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."

1875

THE QUEEN v. PRINCE.

All the facts necessary to support a conviction existed, unless the following facts constituted a defence. The girl Annie Phillips, though proved by her father to be fourteen years old on the 6th of April following, looked very much older than sixteen, and the jury found upon reasonable evidence that before the defendant took her away she had told him that she was eighteen, and that the defendant bonâ fide believed that statement, and that such belief was reasonable.

If the Court should be of opinion that under these circumstances a conviction was right, the defendant was to appear for judgment at the next assizes for Surrey; otherwise the conviction was to be quashed: see *Reg.* v. *Robins* (1) and *Reg.* v. *Olifier.* (2)

April 25. THE COURT (Cockburn, C.J., Bramwell and Pollock, BB., Mellor and Brett, JJ.) reserved the case for the consideration of all the judges.

May 29. The case was argued before Cockburn, C.J., Kelly, C.B., Bramwell, Cleasby, Pollock, and Amphlett, BB., Blackburn, Mellor, Lush, Brett, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ.

No counsel appeared for the prisoner.

Lilley, for the prosecution, cited *Attorney General* v. *Lockwood* (3); *Reg.* v. *Marsh* (4); *Reg.* v. *Hopkins* (5); *Lee* v. *Simpson* (6); *Reg.* v. *Robins* (1); *Reg.* v. *Kipps* (7); *Reg.* v. *Olifier* (2); *Reg.* v. *Mycock* (8); *Reg.* v. *Booth.* (9)

[COCKBURN, C.J., referred to *Reg.* v. *Hibbert.* (12)

POLLOCK, B., referred to *Rex* v. *Lord Grey.* (13)]

June 26. The following judgments were delivered:—

BRETT, J. In this case the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for that he did unlawfully take an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. And, according to the state-

(1) C. & K. 546.
(2) 10 Cox, Cr. C. 402.
(3) 9 M. & W. 378.
(4) 4 D. & R. 260.
(5) Car. & M. 254.
(6) 3 C. B. 871; 16 L. J. (C.P.) 105.
(7) 4 Cox, Cr. C. 167.
(8) 12 Cox, Cr. C. 28.
(9) 12 Cox, Cr. C. 231.
(10) Law Rep. 1 C. C. 184.
(11) 9 St. Tr. 127.

1875

THE QUEEN v. PRINCE.

ment of the case, we are to assume that it was proved on a trial that he did take an unmarried girl out of the possession and against the will of her father, and that when he did so the girl was under the age of sixteen years. But the jury found that the girl went with the prisoner willingly, that she told the prisoner that she was eighteen years of age, that he believed that she was eighteen years of age, and that he had reasonable grounds for so believing. The question is, whether upon such proof and such findings of the jury, the prisoner ought or ought not, in point of law, to be pronounced guilty of the offence with which he was charged. He, in fact, did each and everything which is enumerated in the statute as constituting the offence to be punished, if what he did was done unlawfully within the meaning of the statute. If what he did was unlawful within the meaning of the statute, it seems impossible to say that he ought not to be convicted. If what he did was not unlawful within the meaning of the statute, it seems impossible to say that he ought to be convicted. The question, therefore, is, whether the findings of the jury, which are in favour of the prisoner, prevent what he is proved to have done from being unlawful within the meaning of the statute. It cannot, as it seems to me, properly be assumed that what he did was unlawful within the meaning of the statute, for that is the very question to be determined.

Now, on the one side, it is said that the prisoner is proved to have done every particular thing which is enumerated in the Act as constituting the offence to be punished, and that there is no legal justification for what he did, and, therefore, that it must be held, as a matter of law, that what he did was unlawful within the meaning of the statute, and that the statute was therefore satisfied, and the crime completed. On the other side, it is urged that if the facts had been as the prisoner believed them to be, and as by the findings of the jury he might reasonably believe them to be, and was deceived into believing them to be, he would have been guilty of no criminal offence at all, and therefore he had no criminal intent at all, and therefore that what he did was not criminally unlawful within the meaning of the criminal statute under which he was indicted.

It has been said that even if the facts had been as the prisoner

believed them to be he would still have been doing a wrongful act. The first point, therefore, to be considered would seem to be, what would have been the legal position of the prisoner, if the facts had been as he believed them to be, that is to say, what is the legal position of a man who without force takes a girl of more than sixteen years of age, but less than twenty-one years of age, out of the possession of her father and against his will. The statute 4 & 5 Phil. & Mary, c. 8, has been said to recognise the legal right of a father to the possession of an unmarried daughter up to the age of sixteen. The statute 12 Car. 2, c. 24, seems to recognise the right of a father to such possession up to the age of twenty-one. Mr. Hargreave, in notes 12 and 15 to Co. Lit. 88, b, seems to deduce a right in the father to possession up to the age of twenty-one from those two statutes, and that such right is to be called in law a right jure naturæ. If the father's right be infringed he may apply for a habeas corpus. When the child is produced in obedience to such writ, issued upon the application of a father, if the child be under twenty-one, the general rule is, that "if the child be of an age to exercise a choice, the Court leaves it to elect where it will go; if it be not of that age, and a want of discretion would only expose it to dangers or seductions, the Court must make an order for its being placed in the proper custody, and that undoubtedly is the custody of the father:" Lord Denman, C.J., in *Rex* v. *Glenhill* (1); but if the child be a female under sixteen, the Court will order it to be handed over to the father, in the absence of certain objections to his custody, even though the child object to return to the father. If the child be between sixteen and twenty-one, and refuse to return to the father, the Court, even though the child be a female, gives to the child the election as to the custody in which it will be. "Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of his children till they obtain the age of twenty-one, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate

(1) 4 A. & E. 624.

1875

THE QUEEN v. PRINCE.

utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him": Cockburn, C.J., in *Reg.* v. *Howes.* (1) But if a man take out of her father's possession without force and with her consent a daughter between sixteen and twenty-one, the father would seem to have no legal remedy for such taking. It may be that the father, if present at the taking, might resist such taking by necessary force, so that to an action for assault by the man he might plead a justification. But for a mere such taking without seduction, there is no action which the father could maintain. There never was a writ applicable to such a cause of action. The writ of "ravishment of ward" was only to such as had the right to the marriage of the infant, and was therefore only applicable where the infant was an heir to property, whose marriage was therefore valuable to the guardian: see *Ratcliff's Case.* (2) No such action now exists, and if it did, it would not be applicable to any female child, at all events not to any who was heir-apparent. Neither can a man who with her consent, and without force, takes a daughter who is more than sixteen years old, but less than twenty-one, out of her father's possession or custody, be indicted for such taking. There never has been such an indictment. The statute 3 Hen. 7, c. 2, was enacted against "the taking *any woman* so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, &c., be felony." It was held in *Lady Fulwood's Case* (3) that the indictment must further charge that the defendant carried away the woman *with intent to marry or defile her.* Two things, therefore, were necessary, which are not applicable to the point now under discussion, namely, that the taking should be against the will of the person taken, and that there should be the intent to

(1) 3 E. & E. 332. (2) 3 Co. Rep. 37.

(3) Cro. Car. 484.

marry or defile. The statute 4 & 5 Phil. & Mary, c. 8, deals with the taking out of or from the possession, custody, or government of the father, &c., any maid or woman child unmarried, being under the age of sixteen years. For a mere unlawful taking the punishment is imprisonment for two years. For a taking and marriage; five years. And the girl, if she be more than twelve years old, and consents to the marriage, forfeits her inheritance. The statute 9 Geo. 4, c. 31, s. 19, is enacted against the taking of a woman *against her will* with *intent* to marry or defile her, &c. The same statute, s. 20, is as to an unmarried girl being under the age of sixteen years. It follows from this review that if the facts had been as the prisoner, according to the findings of the jury, believed them to be, and had reasonable ground for believing them to be, he would have done no act which has ever been a criminal offence in England; he would have done no act in respect of which any civil action could have ever been maintained against him; he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl, the father could have had any legal remedy.

We have then next to consider the terms of the statute, and what is the meaning in it of the word "unlawfully." "The usual system of framing criminal Acts has been to specify each and every act intended to be subjected to any punishment": Criminal Law Consolidation Acts, by Greaves, Introduction, p. xxxvii.; and then in some way to declare whether the offence is to be considered as a felony or as a misdemeanor; and then to enact the punishment. It seems obvious that it is the prohibited acts which constitute the offence, and that the phraseology which indicates the class of the offence does not alter or affect the facts, or the necessary proof of those facts, which constitute the offence. There are several usual forms of criminal enactment: "If any one shall with such or such an intent do such and such acts, he shall be guilty of felony, or misdemeanor, as the case may be." Whether the offence is declared to be a felony or a misdemeanor depends upon the view of the legislature as to its heinousness. But the class in which it is placed does not alter the proof requisite to support a charge of being guilty of it. Under such a form of enactment there must be proof that the acts were done, and

1875

THE QUEEN v. PRINCE.

done with the specified intent. Other forms are: "If any one shall *feloniously* do such and such acts he shall be liable to penal servitude," &c., or "If any one shall *unlawfully* do such and such acts, he shall be liable to imprisonment, &c." The first of these forms makes the offence a felony by the use of the word "feloniously;" the second makes the offence a misdemeanor by the use of the word "unlawfully." The words are used to declare the class of the offence. But they denote also a part of that which constitutes the offence. They denote that which is equivalent to, though not the same as, the specific intent mentioned in the first form, to which allusion has been made. Besides denoting the class of the offence, they denote that something more must be proved than merely that the prisoner did the prohibited acts. They do not necessarily denote that evidence need, in the first instance, be given of more than that the prisoner did the prohibited acts; but they do denote that the jury must find, as matter of ultimate proof, more than that the prisoner did the prohibited acts. What is it that the jury must be satisfied is proved, beyond merely that the person did the prohibited acts? It is suggested that they must be satisfied that the prisoner did the acts with a criminal mind, that there was "mens rea." The true meaning of that phrase is to be discussed hereafter. If it be true that this must be proved, the only difference between the second forms and the first form of enactment is, that in the first the intent is specified, but in the second it is left generally as a criminal state of mind. As between the two second forms the evidence, either direct or inferential, to prove the criminal state of mind must be the same. The proof of the state of the mind is not altered or affected by the class in which the offence is placed.

Another common form of enactment is, "If any person *knowingly*, *wilfully*, and *maliciously* do such or such acts he shall be guilty of felony," or, "if any *knowingly* and *wilfully* do such or such acts, he shall be guilty of misdemeanor," or "If any *knowingly*, *wilfully*, and *feloniously*, do such or such acts, he shall be liable, &c." or "if any *knowingly* and *unlawfully* do such and such acts, he shall be liable, &c." The same explanation is to be given of all these forms as between each other as before. They are mere differences in form. And though they be all, or though

several of them be, in one consolidating statute, they are not to be construed by contrast. "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different Acts passed at different times and with different views, and frequently varying from each other in phraseology; and, for the reasons stated in the introduction, these enactments for the most part stand in these Acts with little or no variation in their phraseology, and consequently their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature which may be drawn from a difference in the terms of one clause from those in another will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout:" Greaves on Criminal Law Consolidation Acts, p. 3. I have said that as between each other the same explanation is to be given of these latter forms of enactment as of the former mentioned in this judgment. But as between these latter and the former forms, there is the introduction in the latter of such words as "knowingly," "wilfully," "maliciously." "Wilfully" is more generally applied when the prohibited acts are in their natural consequences not necessarily or very probably noxious to the public interest, or to individuals; so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a primâ facie case, than evidence that the prisoner did the prohibited acts. So as to the word "maliciously," it is usual where the prohibited acts may or may not be such as in themselves import primâ facie a malicious mind. In the same way the word "knowingly" is used, where the noxious character of the prohibited acts depends upon a knowledge in the prisoner of their noxious effect, other than the mere knowledge that he is doing the acts. The presence of the word calls for more evidence on the

1875

THE QUEEN v. PRINCE.

part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury that the mens rea, to be primâ facie inferred from his doing the prohibited acts, did not in fact exist. In *Rex* v. *Marsh* (1) the measure of the effect of the presence in the enactment of the word "knowingly," is explained. The information and conviction were against a carrier for having game in his possession contrary to the statute 5 Anne, c. 14, which declares "that any carrier having game in his possession is guilty of an offence unless it be sent by a qualified person." The only evidence given was, that the defendant was a carrier, and that he had game in his waggon on the road. It was objected, that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The judges held that there was sufficient primâ facie evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance suggested on his behalf. The judgments clearly import, that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute. In other words, that its presence or absence in the statute only alters the burden of proof. "Then, as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor; but under this enactment the party charged must shew a degree of ignorance sufficient to excuse him. Here there was primâ facie evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence:" Bayley, J. "The game was found in his waggon employed in the course of his business as a carrier. That raises a presumption primâ facie that he knew it, and that is not rebutted by the evidence given on the part of the defendant:" Littledale, J.

From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to authorize a conviction is not altered by the presence or absence of the word "knowingly," though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or mens

(1) 2 B. & C. 717.

rea, in every offence really charged as a crime. In some enactments, or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name of the crime imports that a mens rea must be proved, as in murder, burglary, &c. In some the mens rea is contained in the specific enactments as to the intent which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanor, the word "unlawfully" is used instead of the word "feloniously." What reason is there why, in like manner, a criminal mind, or mens rea, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may primâ facie, either by reason of their own nature, or by reason of the form of the statute, import the proof of the mens rea? But even in those cases it is open to the prisoner to rebut the primâ facie evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or mens rea, there cannot be a conviction in England for that which is by the law considered to be a crime.

There are enactments which by their form seem to constitute the prohibited acts into crimes, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a mens rea. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the prohibited acts into crime, or offences against the Crown, but only prohibit them for the purpose of protecting the individual interest of individual persons, or of the revenue. Thus, in *Lee* v. *Simpson* (1), in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to shew that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by Wilde, C.J., (2), is: "The object of the legis-

(1) 3 C. B. 871; 15 L. J. (C.P.) 105.

(2) 3 C. B. at p. 883.

1875

THE QUEEN v. PRINCE.

lature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offence against the Act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant." So the decision in *Morden* v. *Porter* (1) seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them, and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by shewing that his ultimate object or secondary intent was not immoral: *Reg.* v. *Hicklin.* (2) This and similar decisions go rather to shew what is mens rea, than to shew whether there can or cannot be conviction for crime proper without mens rea.

As to the last question, it has become very necessary to examine the authorities. In Blackstone's Commentaries, by Stephen, 2nd ed., vol. iv., book 6, Of Crimes, p. 98: "And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that, to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will. Now there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding, &c.; 2. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it." And at p. 105: "Ignorance or mistake

(1) 7 C. B. (N.S.) 641; 29 L. J. (M.C.) 218. (2) Law Rep. 3 Q. B. 360.

is another defect of will, when a man, intending to do a lawful act, does that which is unlawful; for here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder." In *Fowler* v. *Padget* (1) the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors, but that delay did actually happen to some creditors. Lord Kenyon said: "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice and of our laws that actus non facit reum nisi mens sit rea. The intent and the act must both concur to constitute the crime." And again: "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for."

In *Hearne* v. *Garton* (2) the respondents were charged upon an information, for having sent oil of vitriol by the Great Western Railway, without marking or stating the nature of the goods. By 20 & 21 Vict. c. 43, s. 168, "every person who shall send or cause to be sent by the said railway any oil of vitriol, shall distinctly mark or state the nature of such goods, &c., on pain of forfeiting, &c." By s. 206 such penalty is recoverable in a summary way before justices, with power to imprison, &c. The respondents had in fact sent oil of vitriol unmarked. But the justices found that there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed that in that case, as in the present, the respondents did in fact the prohibited acts, and that in that case, as in this, it was found, as the ultimate proof, that they were deceived into the belief of a dif-

(1) 7 T. R. 509. (2) 2 E. & E. 16; 28 L. J. (M.C.) 216.

1875

THE QUEEN v. PRINCE.

ferent and non-criminal state of facts, and had used all proper diligence. The case is stronger, perhaps, than the present by reason of the word "unlawfully" being absent from that statute. The Court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and therefore that there must be a criminal mind, which there was not. "As to the latter reason, I think the justices were perfectly right: actus non facit reum nisi mens sit rea. The act with which the respondents were charged is an offence created by statute, and for which the person committing it is liable to a penalty or to imprisonment; not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them. I am inclined to think they were civilly liable:" Lord Campbell, C.J. "I was inclined to think at first, that the provision was merely protective; but if it create a criminal offence, which I am not prepared to deny, then the mere sending by the respondents, without a guilty knowledge on their part, would not render them criminally liable, although, as they took Nicholas's word for the contents of the parcel, they would be civilly liable:" Erle, J.

In *Taylor* v. *Newman* (1) the information was under 24 & 25 Vict. c. 96, s. 23: "Whosoever shall unlawfully and wilfully kill, &c., any pigeon, &c." The appellant shot pigeons on his farm belonging to a neighbour. The justices convicted on the ground that the appellant was not justified by law in killing the pigeons, and, therefore, that the killing was unlawful. In other words they held that the only meaning of "unlawfully" in the statute was "without legal justification." The Court set aside the conviction. "I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right:" Mellor, J.

In *Buckmaster* v. *Reynolds* (2) an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election at a vestry. The evidence was that the defendant did obstruct the election because he forced himself and others into the room before eight o'clock believing that eight

(1) 4 B. & S. 89; 32 L. J. (M.C.) 186. (2) 13 C. B. (N.S.) 62.

o'clock was passed. The question asked was, whether an intentional obstruction by actual violence is an offence, &c. This question the Court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts. But Erle, J., continued: "I accompany this statement (i.e. the answer to the question) by a statement that upon the facts set forth I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delicit unless to some extent his mind goes with the act. Here it seems that the respondent acted in the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

In *Reg.* v. *Hibbert* (1) the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls and induced them to go to Manchester. At Manchester he took them to a public house and there seduced the girl in question, who was under sixteen. The prisoner made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not believe that she was a girl of the town. The jury found the prisoner guilty, and Lush, J., reserved the case. In the Court of Criminal Appeal, Bovill, C.J., Channell and Pigott, BB., Byles and Lush, JJ., quashed the conviction. Bovill, C.J.: "In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point the conviction cannot be supported." This case was founded on *Reg.* v. *Green* (2), before Martin, B. The girl was under fourteen, and lived with her father, a fisherman, at Southend. The prisoners saw her in the street by herself and induced her to go with them. They took her to a lonely house, and there Green had criminal intercourse with her. Martin, B., directed an acquittal: "There must, he said, be a taking out of the possession of the father. Here the prisoners picked up the girl in the street, and for anything that appeared, they might not have known that the girl had a father. The girl was not taken out of the possession of

(1) Law Rep. 1. C. C. 184. (2) 3 F. & F. 274.

1875

THE QUEEN v. PRINCE.

any one. The prisoners, no doubt, had done a very immoral act, but the question was whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offence."

In each of these cases the girl was surely in the legal possession of her father. The fact of her being in the street at the time could not possibly prevent her from being in the legal possession of her father. Everything, therefore, prohibited was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished.

In *Reg.* v. *Tinckler* (1), in a case under this section, Cockburn, C.J., charged the jury thus: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes's custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal." The jury found the prisoner not guilty.

In *Reg.* v. *Sleep* (2) the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to a question whether the prisoner knew that the copper, or any part of it, was marked, answered, "We have not sufficient evidence before us to shew that he knew it." The Court of Criminal Appeal held that the prisoner could not be convicted. Cockburn, C.J.: "Actus non facit reum nisi mens sit rea is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this statute, as it was held in *Reg.* v. *Cohen* (3), where this conclusion of the law was stated by

(1) 1 F. & F. 513. (2) 8 Cox, Cr. C. 472.
(3) 8 Cox, Cr. C. 41.

Hill, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute." Pollock, C.B., Martin, B., Crompton and Willes, JJ., agreed.

In the cases of *Reg.* v. *Robins* (1) and *Reg.* v. *Olifier* (2) there was hardly such evidence as was given in this case, as to the prisoner being deceived as to the age of the girl, and having reasonable ground to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case.

In *Reg.* v. *Forbes and Webb* (3), although the policeman was in plain clothes, the prisoners certainly had strong ground to suspect, if not to believe, that he was a policeman; for the case states that they repeatedly called out to rescue the boy and pitch into the constable.

Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea.

Then comes the question, what is the true meaning of the phrase. I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offence within a more serious class of crime. As if a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts, without caring to consider what the truth is as to facts—as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen—he runs the risk. So if he without abduction defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to mens rea applies whenever the facts which are present to the prisoner's mind,

(1) 1 C. & K. 456. (2) 10 Cox, Cr. C. 402.
(3) 10 Cox, Cr. C. 362.

1875

THE QUEEN v. PRINCE.

and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offence at all.

It may be true to say that the meaning of the word "unlawfully" is, that the prohibited acts be done without justification or excuse; I, of course, agree that if there be a legal justification there can be no crime; but I come to the conclusion that a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord Kenyon that "such is our law," and with Cockburn, C.J., that "such is the foundation of all criminal procedure."

The following judgment (in which Cockburn, C.J., Mellor, Lush, Quain, Denman, Archibald, Field, and Lindley, JJ., and Pollock, B., concurred) was delivered by

BLACKBURN, J. In this case we must take it as found by the jury that the prisoner took an unmarried girl out of the possession and against the will of her father, and that the girl was in fact under the age of sixteen, but that the prisoner bonâ fide, and on reasonable grounds, believed that she was above sixteen, viz., eighteen years old. No question arises as to what constitutes a taking out of the possession of her father; nor as to what circumstances might justify such taking as not being unlawful; nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse; for as the case is reserved, we must take it as proved that the girl was in the possession of her father, and that he took her, knowing that he trespassed on the father's rights, and had no colour of excuse for so doing.

The question, therefore, is reduced to this, whether the words in 24 & 25 Vict. c. 100, s. 55, that whosoever shall take "any unmarried girl, being under the age of sixteen, out of the possession of her father," are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is there the word

"maliciously," "knowingly," or any other word used that can be said to involve a similar meaning.

The argument in favour of the prisoner must therefore entirely proceed on the ground that, in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to be to include "knowingly" in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. The section in question is one of a series of enactments, beginning with s. 48, and ending with s. 55, forming a code for the protection of women, and the guardians of young women. These enactments are taken with scarcely any alteration from the repealed statute, 9 Geo. 4, c. 31, which had collected them into a code from a variety of old statutes all repealed by it.

Sect. 50 enacts, that whosoever shall "unlawfully and carnally know and abuse any girl under the age of ten years," shall be guilty of felony. Sect. 51, whoever shall "unlawfully and carnally know and abuse any girl being above the age of ten years, and under the age of twelve years," shall be guilty of a misdemeanor.

It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanor, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in

1875

THE QUEEN v. PRINCE.

fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.

The 55th section, on which the present case arises, uses precisely the same words as those in ss. 50 and 51, and must be construed in the same way, and, if we refer to the repealed statute 4 & 5 Phil. & Mary, c. 8, from the 3rd section of which the words in the section in question are taken, with very little alteration, it strengthens the inference that such was the intention of the legislature.

The preamble states, as the mischief aimed at, that female children, heiresses, and others having expectations, were, unawares of their friends, brought to contract marriages of disparagement, "to the great heaviness of their friends;" and then, to remedy this, enacts, by the 1st section, that it shall not be lawful for any one to take an unmarried girl, being under sixteen, out of the custody of the father, or the person to whom he, either by will or by act in his lifetime, gives the custody, unless it be bonâ fide done by or for the master or mistress of such child, or the guardian in chivalry, or in socage of such child. This recognizes a legal right to the possession of the child, depending on the real age of the child, and not on what appears. And the object of the legislature, being, as it appears by the preamble it was, to protect this legal right to the possession, would be baffled, if it was an excuse that the person guilty of the taking thought the child above sixteen. The words "unlawfully take," as used in the 3rd section of 4 & 5 Phil. & Mary, c. 8, means without the authority of the master or mistress, or guardian, mentioned in the immediately preceding section.

There is not much authority on the subject, but it is all in favour of this view. In *Reg.* v. *Robins* (1), Atcherly, Serjt., then acting as judge of assize, so ruled, apparently (though the report leaves it a little ambiguous) with the approval of Tindal, C.J. In *Reg.* v. *Olifier* (2), Bramwell, B., so ruled at the Old Bailey, apparently arriving at the conclusion independently of *Reg.* v. *Robins*. (1) In *Reg.* v. *Mycock* (3), Willes, J., without having the

(1) 1 C. & K. 456. (2) 10 Cox, Cr. C. 402.
(3) 12 Cox, Cr. C. 28.

case of *Reg.* v. *Olifier* (1) brought to his notice, acted on the case of *Reg.* v. *Robins* (2), saying that a person who took a young woman from the custody of her father, must take the consequences if she proved under age. And Quain, J., followed this decision in *Reg.* v. *Booth.* (3)

We think those rulings were right, and consequently that the conviction in the present case should stand.

The following judgment (in which Kelly, C.B., Cleasby, Pollock, and Amphlett, BB., and Grove, Quain, and Denman, JJ., concurred) was delivered by

BRAMWELL, B. The question in this case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause," such as would exist, for instance, on a taking by a police officer on a charge of felony, or a taking by a father of his child from his school. The statute, therefore, may be read thus: "Whosoever shall take, &c., without lawful cause." Now the prisoner had no such cause, and consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may in the present case be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen out of the possession of and against the will of her father? In fact, he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly," or some equivalent word, was in; and the reason given is, that as a rule the mens rea is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no mens rea. I have used the word "knowingly;" but it will, perhaps, be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than

(1) 10 Cox, Cr. C. 402. (2) 1 C. & K. 456.
(3) 12 Cox, Cr. C. 231.

1875

THE QUEEN v. PRINCE.

such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a mens rea, there is not one when, as he believes, he knows that she is over sixteen.

It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offence unless he, the taker, knows she is under sixteen; that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," &c. Those words are not there, and the question is, whether we are bound to construe the statute as though they were, on account of the rule that the mens rea is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong.

Let us remember what is the case supposed by the statute. It supposes that there is a *girl*—it does not say a woman, but a girl —something between a child and a woman; it supposes she is in the *possession* of her father or mother, or other person having lawful *care or charge* of her; and it supposes there is a *taking*, and that that taking is *against the will* of the person in whose possession she is. It is, then, a *taking* of a *girl*, in the *possession* of some one, *against his will*. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of

the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself; she is not a *girl*, nor of such tender age that she can be said to be in the *possession* of or under the *care or charge* of anyone. I am asked where I draw the line; I answer at when the female is no longer a girl in anyone's possession.

But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession*, and in that other's *care or charge*. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the *act* forbidden by the statute—an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.

In addition to these considerations, one may add that the statute does use the word "unlawfully," and does not use the words "knowingly" or "not believing to the contrary." If the question was whether his act was unlawful, there would be no difficulty, as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Sect. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sect. 51 enacts when she is above ten and under twelve to unlawfully and carnally know her is a misdemeanor. Can it be supposed that in the former case a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor; or that he believed her over twelve, and so had committed no offence at all; or that in a case under s. 51

1875

THE QUEEN v. PRINCE.

he could claim to be acquitted, because he believed her over twelve. In both cases the act is intrinsically wrong; for the statute says if "unlawfully" done. The act done with a mens rea is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So s. 56, by which, whoever shall take away any child under fourteen with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over fourteen?" If not, then neither could he say, "I did take the child with intent to deprive the parent of its possession, but I believed it over fourteen." Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if those words cannot be introduced in s. 56, why can they be in s. 55?

The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. (1) Why? because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in housebreaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no mens rea. Why? because the act of publishing written defamation is wrong where there is no lawful cause.

As to the case of the marine stores, it was held properly that there was no mens rea, where the person charged with the possession of naval stores with the Admiralty mark, did not know the stores he had bore the mark: *Reg.* v. *Sleep* (2); because there is nothing primâ facie wrong or immoral in having naval stores unless they are so marked. But suppose his servant had told him

(1) 10 Cox, Cr. C. 362. (2) 8 Cox, Cr. C. 472.

that there was a mark, and he had said he would chance whether or not it was the Admiralty mark? So in the case of the carrier with game in his possession; unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders; there was nothing wrong in sending such packages as were sent unless they contained vitriol.

Further, there have been four decisions on this statute in favour of the construction I contend for. I say it is a question of construction of this particular statute in doubt, bringing thereto the common law doctrine of mens rea being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety. I think the conviction should be affirmed.

DENMAN, J. I agree in the judgment of my Brothers Bramwell and Blackburn, and I wish what I add to be understood as supplementary to them. The defendant was indicted under the 24 & 25 Vict. c. 100, s. 55, which enacts that "whosoever shall *unlawfully* take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother, or of any other person *having the lawful care or charge of her*, shall be guilty of a misdemeanor."

I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial: see *Reg.* v. *Turner* (1): *Reg.* v. *Ryan.* (2)

In the present case the jury found that the defendant had done everything required to bring himself within the clause as a misdemeanant, unless the fact that he bonâ fide and reasonably believed the girl taken by him to be eighteen years old constituted a defence. That is in other words, unless such bonâ fide and reasonable belief prevented them from saying that the defendant in what he did acted "unlawfully" within the meaning of the

(1) 2 Moo. Cr. C. 41.

(2) 2 Hawk. P. C. C. 25, § 96.

1875

THE QUEEN v. PRINCE.

clause. The question, therefore, is whether, upon this finding of the jury, the defendant did unlawfully do the things which they found him to have done.

The solution of this question depends upon the meaning of the word "unlawfully" in s. 55. If it means "with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. If it only means "without lawful excuse" or justification, then a further question arises, viz. whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offence, by reason, merely, that he bonâ fide and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to the abduction of girls under sixteen, 4 & 5 Phil. & Mary, c. 8, s. 2, and the general course of the decisions upon those enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully," in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse," using those words as equivalent to "without such an excuse as being proved would be a complete legal justification for the act, even where all the facts constituting the offence exist."

Cases may easily be suggested where such a defence might be made out, as, for instance, if it were proved that he had the authority of a Court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child, or school-mistress, or other custodian, and requiring forcible interference by way of protection.

In the present case the jury find that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father, as her guardian by nature: see Co. Litt. 88, b, n. 12, 19th ed., recognized in *Reg.* v. *Howes.* (1) Her father had a right to her personal custody up to the age of twenty-one, and to appoint

(1) 3 E. & E. 332.

a guardian by deed or will, whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz. in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done, within the meaning of the clause. In other words, having knowingly done a wrongful act, viz. in taking the girl away from the lawful possession of her father against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature: He had wrongfully and knowingly violated the father's rights against the father's will. And he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.

Conviction affirmed.

END OF TRINITY TERM, 1875.

INDEX.

ABDUCTION—*Girl under Sixteen—Bonâ fide and reasonable Belief that she was older—Mens rea*—24 & 25 *Vict. c.* 100, *s.* 55.] The prisoner was convicted under 24 & 25 Vict. c. 100, s. 55, of unlawfully taking an unmarried girl under the age of sixteen out of the possession and against the will of her father. It was proved that the prisoner did take the girl, and that she was under sixteen; but that he bonâ fide believed and had reasonable ground for believing that she was over sixteen:—*Held*, by Cockburn, C.J., Kelly, C.B., Bramwell, Cleasby, Pollock, and Amphlett, BB., Blackburn, Mellor, Lush, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ., Brett, J., dissenting, that the latter fact afforded no defence, and that the prisoner was rightly convicted. REG. *v.* PRINCE - - - - - - 154

ACCESSORY—*Accessory before the Fact—Manslaughter—Fight—Stakeholder.*] Two men, having quarrelled, agreed to fight with their fists, and to bind themselves to fight each put down 1*l.*, so that 2*l.* might be paid to the winner. The prisoner consented to hold the 2*l.*, and pay it over to the winner. Otherwise, he had nothing to do with the fight, and he was not present at it. There was no reason to suppose that the life of either man would be endangered.—The men fought, and one of them received injuries of which he afterwards died. The prisoner having been informed who was the winner, but not knowing of the other man's danger, paid over the 2*l.* to the winner:—*Held*, that the prisoner was not an accessory before the fact to the manslaughter of the man killed. THE QUEEN *v.* TAYLOR - 147

AGE OF GIRL—Abduction—Mens rea - 154
See ABDUCTION.

AGENT—Misappropriation of money - 94
See DIRECTION IN WRITING.
SECURITY ENTRUSTED - - 123

AIDER BY VERDICT—Indictment - 74
See FALSE PRETENCES. 1.

AMENDMENT—Indictment - - 1
See LARCENY. 2.

ARSON—Stack of straw - - - 21
See MALICIOUS INJURY.

ASSAULT—*Consent—Submission.*] The prisoner was indicted for indecently assaulting two boys, each of whom was eight years of age. It was proved that the prisoner took the boys into a field, and did acts towards them which amounted to indecent assaults unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence the judge left to the jury the question whether the boys merely submitted to the acts, ignorant of what was going to be done to them or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did; and told the jury that in the former case they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty, on the ground that the boys merely submitted to his act, not knowing its nature:—*Held*, that the direction of the judge was right, and the conviction must be upheld. THE QUEEN *v.* LOCK [10

BAILEE—Misappropriation of security - 123
See SECURITY ENTRUSTED.

BANKER—Cheque when no balance—False pretences - - - - 134
See FALSE PRETENCES. 3.

BANKRUPTCY—Fraudulent removal—Debtor's property - - - - 105
See FRAUDULENT REMOVAL OF DEBTOR'S PROPERTY.

—— Examination of bankrupt - - 3
See WAIVER OF IRREGULARITY.

BARGE—Wrongful use by servant - 28
See EMBEZZLEMENT. 2.

BIRTH—Registration—Evidence - - 85
See REGISTRATION OF BIRTH.

BRIDGE—Damage by locomotive - - 88
See LOCOMOTIVE.

CASE—*Reg.* v. *Fletcher* (Law Rep. 1 C. C. 39) distinguished - - - 81
See RAPE.

CERTIFICATE—Registration of birth - 35
See REGISTRATION OF BIRTH.

CHEQUE—No balance at bank—False pretences
See FALSE PRETENCES. 3. [134

CLERK OR SERVANT—Embezzlement 34, 150
See EMBEZZLEMENT. 1, 2.

COIN—Counterfeit—Previous conviction - 141
See COUNTERFEIT COIN.

CONSENT—Idiotcy—Rape - - - 81
See Rape.
—— Submission—Assault - - - 10
See Assault.
CORONER—Deputy—Perjury - - 15
See Perjury.

COUNTERFEIT COIN—*Previous Conviction—Indictment for Felony—Misdemeanor*—24 & 25 *Vict. c.* 99, *ss.* 12, 37.] The prisoner was indicted under 24 & 25 Vict. c. 99, s. 12, for the felony of uttering counterfeit coin after a previous conviction for a like offence. The jury found him guilty of the uttering, but negatived the previous conviction:—*Held*, that he could not be convicted of the misdemeanor of uttering. The Queen *v.* Henry Thomas - - - - 141

COUNTY BRIDGE—Damage by locomotive 88
See Locomotive.

DEBTOR'S PROPERTY—Fraudulent removal [105
See Fraudulent Removal of Debtor's Property.

DEED—Forgery - - - - 22
See Forgery.

DEPOSITION—*Evidence—Illness of Witness*—11 & 12 *Vict. c.* 42, *s.* 17.] At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows:—The medical attendant of the witness was called and said: "I know M. L. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the Court going to her house and she herself coming to the court." The witness whose deposition it was proposed to read lived not far from the Court:—*Held*, that the deposition was not admissible. The Queen *v.* Farrell - 116

DEPUTY CORONER—Perjury - - 15
See Perjury.

DIRECTION IN WRITING—*Agent—Misappropriation of Money*—24 & 25 *Vict. c.* 96, *s.* 75.] The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for 300*l.*, J. bonds, at 112, 336*l.*;" and the contract note ran, "Sold to Mrs. S. (the prosecutrix) 300*l.* J. at 112, 336*l.*" and was signed by the prisoner. The prosecutrix wrote in reply: "I have just received your note and contract note for three J. shares, and inclose a cheque for 336*l.* in payment." The prisoner never paid for the bonds, but in violation of good faith appropriated to his own use the proceeds of the cheque;—*Held*, that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 & 25 Vict. c. 96, s. 75; and that the prisoner was rightly convicted of a misdemeanor under that section. The Queen *v.* Christian - - - - - - 94

ECCLESIASTICAL LAW—Letter of orders 22
See Forgery.

EMBEZZLEMENT—*Clerk or Servant*—24 & 25 *Vict. c.* 96, *s.* 68.] The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money: but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him:—*Held*, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 & 25 Vict. c. 96, s. 68. The Queen *v.* Negus 34

2. —— *Clerk or Servant.*] The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office and in the business of the board. In his father's absence the prisoner acted for him at the meetings of the board, and when present he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use:—*Held*, that there was evidence that the prisoner was a clerk or servant, or employed as a clerk or servant, and was guilty of embezzlement. The Queen *v.* Foulkes - - - 150

3. —— 24 & 25 *Vict. c.* 96, *s.* 68—*Wrongful Use of Barge by Servant of Owner—Freight received neither "for," nor "in the Name," nor "on Account of" Master.*] The prisoner was captain of a barge, and in the exclusive service of its owner. He was remunerated with half the earnings of the vessel, and had no authority to take any other cargoes but those appointed for him. It was his duty to account to his master for the proceeds of each voyage. On one occasion, although ordered to bring the barge back empty from a certain place, and forbidden to take a particular cargo, he, nevertheless, loaded such cargo in the barge, returned therewith, and received the freight. He did not profess to carry the cargo or receive the freight for his master, and the person paying the money did not know for whom he paid it. The prisoner declared that the barge came back empty, and never accounted for the freight:—*Held*, that he was not guilty of embezzlement, as the money was not received or taken into possession by him "for, or in the name of, or on the account of his master or employer," within 24 & 25 Vict. c. 96, s. 68. The Queen *v.* Cullum 28

EVIDENCE—Certificate—Registration of birth 85
See Registration of Birth.
—— Examination of bankrupt - - 3
See Waiver of Irregularity.
—— False pretences—Previous fraud - 128
See False Pretences. 2.
—— Illness of witness—Deposition - 116
See Deposition.
EXAMINATION OF BANKRUPT—Irregularity 3
See Waiver of Irregularity.

FALSE PRETENCES—*Aider by Verdict—Receiving—Indictment*—24 & 25 *Vict. c.* 96, *ss.* 88, 95—7 *Geo.* 4, *c.* 64, *s.* 21—14 & 15 *Vict. c.* 100, *s.* 25.] The prisoner was indicted, under 24 & 25 Vict. c. 96, s. 95, for unlawfully receiving goods knowing them to have been obtained by false pretences. The indictment did not set out the false pretences. At the trial, at the close of the case for the prosecution, it was objected on behalf of the prisoner, that the indictment was bad, because it did not set out the false pretences. The prisoner was convicted:—*Held*, that the objection must be taken to have been made after verdict in arrest of judgment; and that after verdict the indictment was good. The Queen *v.* Goldsmith 74

2. —— *Evidence—Previous Frauds—Guilty Knowledge.*] On the trial of an indictment for endeavouring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. This ring was not produced:—*Held*, that the evidence was properly admitted. The Queen *v.* Francis - - - - - 128

3. —— *Pretence—Cheque given for Goods—No Balance at Bank.*] The prisoner was indicted for obtaining goods by (amongst others) the false pretence that certain cheques were good and valid orders for the payment of their amount. It was proved that the prisoner ordered goods of the prosecutors, and said he wished to pay ready money for them. He gave cheques on a bank for the price, and took away the goods. The prisoner had shortly before opened an account at the bank, but had drawn out the amount deposited except a few shillings. Various cheques of his had been refused payment, and he would not have been permitted to overdraw. He did not intend when he gave the cheques to the prosecutor to meet them, but intended to defraud:—*Held*, that there was evidence of the false pretence that the cheques were good and valid orders for the payment of their amount. The Queen *v.* Hazleton - 134
FELONY—Indictment for—Misdemeanor - 141
See Counterfeit Coin.

FORGERY—*Deed*—24 & 25 *Vict. c.* 98, *s.* 20—*Letter of Orders.*] By 24 & 25 Vict. c. 98, s. 20, it is felony to forge "any deed, or any bond or writing obligatory:"—*Held*, that a letter of orders under the seal of a bishop is not a deed within that section. The Queen *v.* Morton - 22

FRAUDULENT REMOVAL OF DEBTOR'S PROPERTY—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 11, *subs.* 5—*Property of Debtor.*] On the 21st of December, 1872, the prisoner executed an assignment of the property upon his farm to trustees for the benefit of certain of his creditors. The assignment was not registered as a bill of sale, and the prisoner continued in occupation of the farm, and in possession of the property assigned, under an agreement with the trustees by which he was to hold possession as their bailiff. On the 14th, 16th, and 17th of October, 1873, the prisoner fraudulently removed stock from the farm of more than 10*l.* in value, forming part of the property assigned. On the 17th of October, 1873, the prisoner commenced proceedings for liquidation by arrangement, and on the 7th of November, 1873, the prisoner's creditors duly resolved that his affairs should be liquidated by arrangement, and a trustee was appointed. The prisoner was indicted under s. 11, subs. 5, of the Debtors Act, 1869, for having, within four months next before the commencement of the liquidation, fraudulently removed part of his property of the value of 10*l.* and upwards:—*Held*, that, though the assignment, not having been registered as a bill of sale, was void as against the trustee in liquidation, still, inasmuch as, at the time of the fraudulent removal, the assignment was in force and the property in the stock removed in the trustees under the assignment, he could not properly be convicted. The Queen *v.* Thomas Creese - - - - 105

GIRL UNDER SIXTEEN—Abduction - 151
See Abduction.
GUILTY KNOWLEDGE—Evidence—Previous frauds - - - 128
See False Pretences. 2.

HIGHWAY—Locomotive—Damage - 88
See Locomotive.

IDIOT—Rape - - - - - 81
See Rape.
IDIOTCY OF PROSECUTRIX—Rape - 81
See Rape.
ILLNESS OF WITNESS—Deposition - 116
See Deposition.
INDICTMENT—Aider by verdict - - 74
See False Pretences. 1.
—— Amendment - - - - 1
See Larceny. 2.
—— Felony—Misdemeanor - - - 141
See Counterfeit Coin.
INQUISITION—Deputy Coroner - - 15
See Perjury.
IRREGULARITY—Waiver - - - 3
See Waiver of Irregularity.

LARCENY—*Taking invito domino—Post Office Savings Bank*—24 & 25 *Vict. c.* 14.] The prisoner was a depositor in a Post Office Savings Bank, in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, stating in his notice the number of his depositor's book and

LARCENY—*continued.*

the amount to be withdrawn. A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at N., to pay the prisoner 10*s.* He went to that office, and handed his depositor's book and the warrant to the clerk. But the clerk, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed the latter amount upon the counter. The clerk entered the amount paid, 8*l.* 16*s.* 10*d.*, in the prisoner's depositor's book, and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an animus furandi, and knowing the money to be the money of the Postmaster-General:—*Held*, by Cockburn, C.J., Bovill, C.J., Kelly, C.B., Blackburn, Keating, Mellor, Lush, Grove, Denman, and Archibald, JJ., and Pigott, B. (Martin, Bramwell, and Cleasby, BB., and Brett, J., dissenting) that the prisoner was guilty of larceny. By Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ., on the ground that, even assuming the clerk to have the same authority to part with the possession of and property in the money which the Postmaster-General would have had, the mere delivery under a mistake, though with the intention of passing the property, did not pass the property; and the possession being obtained animo furandi, there was both a taking and stealing within the definition of larceny:—By Bovill, C.J., Kelly, C.B., and Keating, J., on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and therefore no property passed to the prisoner, and the possession was obtained animo furandi:—By Pigott, B., on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny:—*Held*, by Martin, Bramwell, and Cleasby, BB., and Brett, J., that the prisoner was not guilty of larceny. The Queen *v.* George Middleton - - 38

2. —— *Indictment — Amendment — Money —* 14 *&* 15 *Vict. c.* 100, *ss.* 1, 18.] The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign:—*Held*, that by 14 & 15 Vict. c. 100. s. 1, the Court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence;" and that, by s. 18, the indictment so amended was proved. The Queen *v.* Gumble 1

LAWFUL OR REASONABLE CAUSE—Coroner
See Perjury. [15

LETTER OF ORDERS—Deed—Forgery - 22
See Forgery.

LIQUIDATION — Fraudulent removal — Debtor's property - - - - 105
See Fraudulent Removal of Debtor's Property.

LOCOMOTIVE — *Road — Damage to Bridge — County Bridge*—24 *&* 25 *Vict. c.* 70, *ss.* 6, 7, 13.] By 24 & 25 Vict. c. 70, s. 7: "Where any turnpike or other roads upon which locomotives are used pass over any stream, or watercourse, navigable river, canal, or railway by means of any bridge, and such bridge shall be damaged by reason of any locomotive passing over the same or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in or having the charge of such navigable river, canal, or railway, or the tolls thereof, or of such bridge, shall be liable to repair any damage so to be occasioned; but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons as aforesaid respectively interested in or having the charge of such river, canal, or railway, or the tolls thereof, or of such bridge, by and at the expense of the owner or the person having the charge of such locomotive":—*Held*, that this section does not apply to a county bridge. The Queen *v.* Kitchener - - - - - 88

MALICE—Injury to property - - 119
See Malicious Injury.

MALICIOUS INJURY—24 *&* 25 *Vict. c.* 97, *s.* 51—*Malice—Intention.*] The prisoner had been fighting with persons in the street and threw a stone at them, which struck a window and did damage to an amount exceeding 5*l.* He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window:—*Held*, that by thus finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed. The Queen *v.* Pembliton - - - - - 119

MALICIOUS INJURY—*Arson*—24 *&* 25 *Vict. c.* 97, *s.* 17—*Stack of Straw.*] The prisoner was indicted, under 24 & 25 Vict. c. 97, s. 17, for setting fire to a stack of straw. It was proved that he set fire to a quantity of straw on a lory:—*Held*, that he could not properly be convicted. The Queen *v.* Charles Satchwell - - 21

MANSLAUGHTER—Accessory—Stakeholder 147
See Accessory.

MASTER AND SERVANT—Embezzlement 28,
See Embezzlement. 1, 2, 3. [34, 150

MENS REA—Girl under sixteen—Abduction
See Abduction. [154

MISAPPROPRIATION—Agent - 94, 123
See Direction in Writing.
Security Entrusted.

MISDEMEANOR—Indictment for felony - 141
See Counterfeit Coin.

MONEY—Larceny—Indictment - - 1
See Larceny. 2.

ORDERS, LETTER OF—Forgery - - 22
See Forgery.

PERJURY—*Coroner — Deputy — Absence of Coroner—Lawful or Reasonable Cause*—6 *&* 7 *Vict. c.* 83, *ss.* 1, 2.] By 6 & 7 Vict. c. 83, s. 1, coroners are empowered to appoint deputies, provided that

PERJURY—*continued.*

no deputy shall act "except during the illness of the coroner or his absence from any lawful or reasonable cause." By s. 2, "No inquisition shall be quashed by reason of such inquisition having been taken before any deputy instead of the coroner himself." The prisoner being indicted for perjury committed upon an inquest held before a deputy coroner, and the objection having been taken that there was no lawful or reasonable cause for the absence of the coroner:—*Held*, first, that the question of lawful or reasonable cause was one for the judge, not for the jury. *Held*, secondly (by Kelly, C.B., Pigott, B., Denman, J., and Pollock, B., Mellor, J., doubting), that, whatever the cause of absence, by s. 2 a valid inquisition might have been founded upon the inquest, and therefore the deputy had jurisdiction, and perjury was committed. The Queen *v.* Johnson [15

PLEADING (CRIMINAL)—Aider by verdict 74
See False Pretences. 1.

POST OFFICE—Larceny - - - 38
See Larceny. 1.

POST OFFICE SAVINGS BANK—Larceny 38
See Larceny. 1.

PREVIOUS CONVICTION—Counterfeit coin 141
See Counterfeit Coin.

PREVIOUS FRAUDS — Evidence — False pretences - - - - 128
See False Pretences. 2.

PRINCIPAL AND AGENT—Misappropriation by agent - - - 94, 123
See Direction in Writing.
Security Entrusted.

PRIZE-FIGHT—Manslaughter—Accessory 147
See Accessory.

PROPERTY OF BANKRUPT — Fraudulent removal - - - - 105
See Fraudulent Removal of Debtor's Property.

RAPE—*Idiotcy of Prosecutrix.*] On an indictment for rape, it was proved that the prosecutrix was fourteen and a half years old, and that ever since she was six weeks old she was blind and wrong in her mind, that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself, that if placed in a chair by any one she would remain there till night, passing her evacuations and water in the chair, that if told to lie down she would do so, that she could not communicate to her friends what she wanted, that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work. It was further proved that the father of the prosecutrix, on returning home one day, looked through the window of the sitting-room and saw the prisoner lying on the prosecutrix on a couch in the room, on which she had been placed by her sister, whom the prisoner then sent on an errand to a distance, and who desired the prosecutrix to lie on the couch till her return. On going into the room he found the prisoner standing up at the end of the couch, buttoning up his trowsers, while the prosecutrix was lying

RAPE—*continued.*

quietly on the couch. There were no external marks of violence on the person of the prosecutrix. The learned judge told the jury that if the prisoner had connection with the prosecutrix by force, and if she was in such an idiotic state that she did not know what the prisoner was doing, and if the prisoner was aware of her being in that state, they might find him guilty of rape. But if from animal instinct she yielded to the prisoner without resistance, or if the prisoner from her state and condition had reason to think she was consenting, they ought to acquit him. The jury found the prisoner guilty of an attempt at rape:—*Held*, that the prisoner was rightly convicted. *Reg.* v. *Fletcher* (Law Rep. 1 C. C. 39) explained and distinguished. The Queen *v.* Barratt - 81

RECEIVING—False pretences - - 74
See False Pretences. 1.

REGISTRATION OF BIRTH—*Evidence—Certified Copy.*] An extract from a register of births purporting to be signed and certified by a deputy superintendent registrar, as the person in whose custody the register book is, is admissible in evidence on its mere production. The Queen *v.* Weaver - - - - - 85

SECURITY ENTRUSTED—*Bailee—Agent—Fraudulent Misappropriation of Security*—24 & 25 *Vict. c.* 96, *ss.* 75, 76.] The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to employ a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use;—*Held*, that no offence had been committed under s. 75 or s. 76 of 24 & 25 Vict. c. 96. The Queen *v.* Cooper - 123

"STACK OF STRAW" - - - 21
See Malicious Injury.

STAKEHOLDER—Prize fight—Accessory 147
See Accessory.

STATUTES:

7 Geo. 4, c. 6, s. 21 - - - - 74
See False Pretences.

6 & 7 Vict. c. 83, ss. 1, 2 - - - 15
See Perjury.

11 & 12 Vict. c. 42, s. 17 - - - 116
See Deposition.

14 & 15 Vict. c. 100, s. 25 - - - 74
See False Pretences. 1.

24 & 25 Vict. c. 73, ss. 6, 7, 13 - - 88
See Locomotive.

24 & 25 Vict. c. 96, s. 68 - - - 34
See Embezzlement. 1.

—— —— s. 75 - - - - 94
See Direction in Writing.

—— —— ss. 75, 76 - - - 123
See Security Entrusted.

—— —— ss. 88, 95 - - - 74
See False Pretences. 1.

24 & 25 Vict. c. 97, s. 17 - - - 21
See Malicious Injury.

STATUTES—*continued.*
24 & 25 Vict. c. 97, s. 51 - - - 119
See Malicious Injury.
24 & 25 Vict. c. 98, s. 20 - - - 22
See Forgery.
24 & 25 Vict. c. 99, ss. 12, 37 - - 141
See Counterfeit Coin.
24 & 25 Vict. c. 100, s. 55 - - 154
See Abduction.
32 & 33 Vict. c. 71, ss. 18, 96, 97, 108, 125 3
See Waiver of Irregularity.
STRAW—Malicious injury - - - 21
See Malicious Injury.
SUBMISSION—Consent—Assault - - 10
See Assault.

WAIVER OF IRREGULARITY—*Bankruptcy—Examination of Bankrupt*—32 & 33 *Vict. c.* 71, *ss.* 18, 96, 97, 108, 125.] A debtor petitioned for liquidation by arrangement on the 8th of June. The first meeting of creditors was held and a resolution appointing a trustee passed on the 28th of June. The registrar's certificate of the appointment was dated the 5th of July. By a summons, issued on the 29th of June, the debtor was summoned to appear on the 9th of July, and be examined under ss. 96 and 97 of the Bankruptcy Act, 1869. He appeared on the 9th of July, and took no objection to the summons. The examination was adjourned to the 12th of July, on which day he again appeared without objection, and was examined. The examination having been admitted in evidence against him on a subsequent indictment for an offence under s. 11 of the Debtor's Act, 1869:—*Held*, that supposing the summons to have been improperly issued before the registrar's certificate of the appointment of the trustee had been given, the defect was only an irregularity, which the debtor had waived by appearing and submitting to be examined without objection; and that the examination was properly admitted in evidence. The Queen *v.* Widdop - - - - - 3

WITNESS—Illness—Deposition - - 116
See Deposition.
WORDS—"Clerk or servant" - 34, 150
See Embezzlement. 1, 2.
—— "Deed" - - - - - 22
See Forgery.
—— "Direction in writing" - - 94
See Direction in Writing.
—— "For or in the name or account of" - 28
See Embezzlement. 3.
—— "Lawful or reasonable cause" - 15
See Perjury.
—— "Stack of straw" - - - 21
See Malicious Injury.

END OF VOL. II.

LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET AND CHARING CROSS.